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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

~~72-397~~

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents ~~and Joint Petitioners.~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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Attorneys for Respondents ~~and Joint Petitioners~~

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APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion* Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.

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THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents ~~and Joint Petitioners.~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

~~The Attorney General of Arizona, on behalf of the State of Arizona, and its State Land Department and State Land Commissioner, respondents, and~~ The County Attorney of the County of Mohave, a political subdivision of the State of Arizona, and Bonelli Cattle Company, a California corporation, petitioners,

jointly petition for a writ of certiorari to review the judgments and decisions of the Supreme Court of Arizona rendered in this case respectively on October 4, 1971, and April 13, 1972.

OPINIONS BELOW

The Supreme Court of Arizona rendered two decisions.

The first decision of October 4, 1971, was on review on petition of the State of Arizona of the decision of the Court of Appeals of Arizona, Division 1, Department A, decided February 16, 1970, 11 Ariz. App. 412, 464 P. 2d 999, wherein the Court of Appeals affirmed the judgment of the trial court in quieting title against the State of Arizona and its State Land Department to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river. This decision reversed the judgment of the trial court and vacated the opinion of the Court of Appeals and is reported

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and its State Land Department to the lands
involved in this litigation situate along
the Colorado River on the Arizona side of
the river. This decision reversed the judg-
ment of the trial court and vacated the opi-
nion of the Court of Appeals and is reported

at 107 Ariz. 465, 489 P. 2d 699 (Appendix A, *infra*).

Upon timely motion for rehearing by Bonelli, in which proceeding several amici curiae briefs were filed including the County of Mohave supporting the motion for rehearing, the Supreme Court of Arizona on April 13, 1972, in effect denied the motion for rehearing by supplementing its previous decision. This latter decision is reported at 108 Ariz. 258, 495 P. 2d 1312 (Appendix B, *infra*).

In both Supreme Court decisions Justice Lockwood dissented and filed an opinion in both decions (Appendix A and B, *infra*).

JURISDICTION

The final decision of the Supreme Court of Arizona was filed April 13, 1972. On joint application of petitioners and respondents, Mr. Justice Douglas by order dated June (*sic*) 12, 1972, extended the time for filing a petition for a writ of certiorari to and including September 9, 1972.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

The questions presented herein are a result of a direct conflict of the decisions of the Arizona Supreme Court (Appendix A and B, *infra*) with the decision in United States v. Claridge, reported in 279 F. Supp. 87, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 933, certiorari denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994 (Appendix C, *infra*). These decisions involved ownership and changes of ownership of lands along the Colorado River by virtue of its past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the rechannelization of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U. S. C. 617 et seq.). While the Claridge de-

The jurisdiction of this Court is invoked under 28 U.S.C. 1251(b)(3).

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The questions presented herein are the result of a direct conflict of the decisions of the Arizona Supreme Court (Appendix A and B, infra) with the decision in United States v. Ohio, reported in 279 F. Supp. 97, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 989, certiorari denied, 396 U.S. 1009, 90 S. Ct. 561, 25 L. Ed. 2d 523 (Appendix C, infra). These decisions involved ownership and change of ownership of lands along the Colorado River by virtue of the past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the reclamation of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U.S.C. 617 et seq.). While the Ohio decision

cision did not involve an area where rechannelization had occurred, the difference between the high water mark and the bed of the Colorado River as fixed by Claridge and as fixed by the Arizona Supreme Court decisions as they affect the Bonelli land is clearly shown on Appendix D, *infra*, and attached hereto, p. 33.

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of a navigable river caused by the construction of dams and rechannelization of the stream bed by the United States changes or alters the ordinary high water mark for purposes of changing or altering the ownership of the exposed lands resulting from the construction of such works.

3. Whether Federal or State law

controls the ownership of land gained or lost by accretion on property conveyed by the United States prior to statehood.

4. Whether the decisions of the Arizona Supreme Court affects title to Federal and Indian lands as well as private lands bordering the Colorado River.

5. Whether the latter decision of the Arizona Supreme Court dated April 13, 1972, misconstrues or misinterprets the Submerged Lands Act of Congress as a grant by Congress to the States of lands formerly beneath navigable waters up to the ordinary high water mark without recognizing that said Act specifically exempts from the effect thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions of the Arizona Supreme Court constitute a taking of property by the State of Arizona

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to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions
of the Arizona Supreme Court constitute a
taking of property by the State of Arizona

without compensation having been made therefor in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Article 2, Section 17, Arizona Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Submerged Lands Act of Congress enacted in 1953, 43 U. S. C. 1301 et seq.

The Act of Congress of June 17, 1902, 32 Stat. 388, and the unpublished Reclamation Withdrawal Order of January 13, 1903, issued pursuant thereto, a certified copy of the entire Order being filed separately with the Clerk and pertinent parts thereof being set forth herein on page 34 et seq.

The Boulder Canyon Project Act enacted in 1928, 43 U. S. C. 617 et seq.

The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, §17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts

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The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, §17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts

of the Submerged Lands Act of Congress enacted in 1953. C. 65, Title I, §2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

"§1301. Definitions

"When used in this chapter --

"(a) The term 'lands beneath navigable waters' means --

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

* * * * *

"(f) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title II, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in

of the Submerged Lands Act of Congress, enacted in 1953, c. 65, Title I, § 2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

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* * * * *

"(c) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title IX, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in

pertinent part:

"§1311. Rights of the States - Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;".

C. 65, Title II, §5, 67 Stat. 32, now appears as 43 U. S. C. Section 1313 and provides in pertinent part:

"§1313. Exceptions from confirmation and establishment of States' title, power and rights

"There is excepted from the operation of section 1311 of this title --

"(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union * * * ".

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"§1311. Rights of the States - Confirmation of title; agreement of title and ownership of lands and resources; management, administration, leasing, development, and use

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"§1313. Reservations from confirmation and establishment of States' title; power and rights

"There is excepted from the operation of section 1311 of this title --

"(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union * * *".

The Boulder Canyon Project Act was enacted by Congress December 21, 1928. C. 42 §1, 45 Stat. 1057, now appears as 43 U. S. C. Section 617 and the pertinent part provides:

"§617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

"For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States * * * the Secretary of the Interior * * * is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir * * * and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam * * * *".

The pertinent parts of the Fifth and Fourteenth Amendments to the Constitution of the United States are:

"Amendment V. No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

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"Amendment XIV. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law; * * * ."

The following is the pertinent part of Article 2, Section 17, Constitution of Arizona:

"Section 17. * * * No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner * * * ."

The pertinent part of Section 20, Second, of the Act of June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579, which enabled the people of the Territory of Arizona to form a constitution and state government is:

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute

"Amendment XIV, Section 1. * * * No State
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any State deprive any person of * * *
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and that until the title of such Indian or
Indian tribes shall have been extinguished
the same shall be and remain subject to
the disposition and under the absolute

jurisdiction and control of the Congress of the United States; * * * ".

and the pertinent part of the Ordinance provided by the Arizona Constitution, Article XX, Section Fourth, is:

"Fourth. Public lands; Indian lands

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

STATEMENT

The Colorado River was declared to be a navigable stream by this Court in Arizona v. California, 283 U. S. 423, 75 L. Ed 1154 (1930). The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western

jurisdiction and control of the Congress of the United States; * * * ".

and the pertinent part of the Ordinance provided by the Arizona Constitution, Article XX, Section Fourth, is:

"Fourth. Public lands; Indian lands

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and unreserved public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

STATEMENT

The Colorado River was declared to be a navigable stream by this Court in Arizona v. California, 283 U. S. 423, 75 L. Ed. 1154 (1930). The Colorado River emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western

boundary of the State of Arizona. In certain areas along the river, the boundary between Arizona and the States of California and Nevada is set by agreement; thus the middle thread of the river may or may not coincide with the actual boundary. In Arizona the river's course is bordered by the Counties of Mohave and Yuma.

The Bonelli land in question was originally surveyed in 1905 and 1906 and the official plat of survey was approved by the Surveyor General of the United States Department of the Interior on June 29, 1906. At that time the Colorado River was entirely to the west of the subject land and did not in any way encroach upon said land (see Appendix D, *infra*). Pursuant to the Act of Congress approved July 27, 1866, 14 Stat. 292, the subject lands together with other lands were conveyed by patent issued by the United States on November 5, 1910, to The Atlantic and Pacific Railroad Company, pre-

boundary of the State of Arizona. In certain areas along the river, the boundary between Arizona and the States of California and Nevada is set by agreement; these the middle thread of the river may or may not coincide with the actual boundary. In Arizona the river's course is bordered by the Counties of Mohave and Yuma.

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decessor in interest to Santa Fe Pacific Railroad Company, in accordance with the official plat of survey.

On February 14, 1912, the State of Arizona was admitted to the Union. Since the original survey and conveyance of the subject land by the United States the Colorado River has moved eastward and has in the past covered much, if not all, of the subject land. Immediately prior to 1959 the active flow channel of the Colorado River occupied almost all of the subject land with the exception of a small parcel in the southeast corner thereof (Appendix D, *infra*).

In 1959 the Bureau of Reclamation rechanneled the Colorado River in the area of the subject land resulting in the active flow of the Colorado River being restricted to occupy only a portion of the subject land. Today part of the subject land lies outside of the artificially created active flow channel of the Colorado River on both the east

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In 1959 the Bureau of Reclamation realigned the Colorado River in the area of the subject land resulting in the active flow of the Colorado River being restricted to occupy only a portion of the subject land. Today part of the subject land lies outside of the artificially created active flow channel of the Colorado River on both the east

and west sides of the channel or on the Arizona and Nevada sides, respectively.

At statehood the boundary between Arizona and Nevada lay a considerable distance west of the subject land (Appendix D, *infra*). By virtue of the Colorado River Boundary Compact between the States of Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) the boundary at this point now lies down the center of the river as rechanneled by the Bureau of Reclamation in 1959.

On or about April 13, 1962, the Bonelli Cattle Company filed an action in the Superior Court of Mohave County, Arizona, against the State of Arizona and its State Land Department and State Land Commissioner to quiet title to the subject land and the cause was submitted to the court on an agreed statement of facts. Thereafter the court on July 17, 1967,

and west sides of the channel or on the Arizona and Nevada sides, respectively.

At stakeboad the boundary between Arizona and Nevada lay a considerable distance west of the subject land (Appendix D, infra). By virtue of the Colorado River Boundary Compact between the States of Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) the boundary at this point now ites down the center of the river as redmeasured by the Bureau of Reclamation in 1959.

On or about April 13, 1962, the Bonelli Cattle Company filed an action in the Superior Court of Mohave County, Arizona, against the State of Arizona and its State Land Department and State Land Commissioner to quiet title to the subject land and the cause was submitted to the court on an agreed statement of facts. Thereafter the court on July 17, 1967,

entered its judgment and decree quieting title to the subject lands in favor of the plaintiff Bonelli and against the defendants the State of Arizona and its State Land Department and State Land Commissioner. From this decision the defendants appealed to the Court of Appeals of Arizona, Division 1, Department A, and the Court of Appeals by decision dated February 16, 1970, reported at 11 Ariz. App. 412, 464 P. 2d 999, affirmed the judgment and decree of the superior court. Upon application of defendants the Supreme Court of Arizona granted review and by its decisions of October 4, 1971, and April 13, 1972, reversed the judgment of the trial court and vacated the decision of the Court of Appeals. By said decisions the Supreme Court of Arizona in effect held that the State of Arizona had acquired title to the Bonelli land by virtue of the fact that the Colorado River had moved in an eastward direction in a slow and imperceptible man-

entered its judgment and decree quieting title to the subject lands in favor of the plaintiff Bonelli and against the defendants the State of Arizona and its State Land Department and State Land Commissioner. From this decision the defendants appealed to the Court of Appeals of Arizona, Division 1, Department A, and the Court of Appeals by decision dated February 16, 1970, reported at 11 Ariz. App. 412, 465 P. 2d 999, affirmed the judgment and decree of the superior court. Upon application of defendants the Supreme Court of Arizona granted review and by its decisions of October 4, 1971, and April 13, 1972, reversed the judgment of the trial court and vacated the decision of the Court of Appeals. By said decisions the Supreme Court of Arizona in effect held that the State of Arizona had acquired title to the Bonelli land by virtue of the fact that the Colorado River had moved in an eastward direction in a slow and imperceptible man-

ner during which time the State of Arizona acquired title to the land and that the channelization of the Colorado River confining its flow to a part of the old bed did not cause a loss of the State's ownership. The Supreme Court in its decisions established the State's ownership to the land once covered by the Colorado River to the *high water mark*.

Upon timely petition for rehearing by Bonelli and after extensive briefs had been filed by Bonelli, the Attorney General and eight amici curiae, including the County Attorney of Mohave County (although he is not named in the reported decision), the Supreme Court of Arizona on April 13, 1972, in effect denied Bonelli's petition for rehearing by supplementing its first decision, once again holding that the State's title extended to the *high water mark*.

The Claridge decision on the questions involved herein was rendered November

7, 1966, by Judge Craig of the United States District Court for the District of Arizona, 279 F. Supp. 87, and the affirming decision of the United States Court of Appeals Ninth Circuit, 416 F. 2d 933, was issued September 19, 1969. These decisions were never considered by the Court of Appeals of Arizona nor the Supreme Court of Arizona in its first decision. However on the petition for rehearing before the Supreme Court of Arizona Bonelli and amici curiae called to the court's attention and urged the court that its first decision of October 4, 1971, as it related to the extent of the State's ownership of the land was in direct conflict with the decision of the United States District Court for the District of Arizona in Claridge, 279 F. Supp. 87, and affirmed by the United States Court of Appeals Ninth Circuit, 416 F. 2d 933, and that therefore the Arizona Supreme Court's decisions should be modified accordingly.

The effect of the Claridge decisions

was brushed off by the Supreme Court of Arizona in the following language: "It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge, 279 F. Supp. 87, aff'd 9th Cir., 416 F. 2d 933." (page 1314, 495 P. 2d).

The conflict between the two decisions of the Arizona Supreme Court and the Claridge decision as to what constitutes the "high water mark" is clearly shown on Appendix D, *infra*, and it will be noted that the line established by the Arizona Supreme Court completely wipes out all of Bonelli's title and invades about one-half of Section 2 to the east, which is Federal land.

As a result of these conflicting decisions in both cases where the State of Arizona was a party, we have a situation which presents a critical dilemma as to the ownership of land along the Colorado River

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REASON FOR GRANTING WRIT

I. *Conflict of Authorities.*

As stated before, there is a direct conflict between the two decisions of the Arizona Supreme Court and the Federal courts relating to the extent of the State's ownership of land along the Colorado River. In other words, the State's ownership as against the United States under the Claridge decision extends to one line; on the other hand, the State's ownership under the Arizona Supreme Court decisions as it applies against individuals extends to another line much greater in depth (see Appendix D, *infra*).

The Claridge case involves almost an identical factual situation with Bonelli and was one in which the State of Arizona was a party and in which the State of Arizona petitioned this Court for a writ of certiorari, which petition was denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90

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REASONS FOR GRANTING WRIT

1. Conflict of Authorities.

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1960, 357 U. S. 961, 25 L. Ed. 2d 253.

S. Ct. 994. Questions numbered 1 and 2 herein presented are identical in substance with Questions numbered 1 and 3 presented by the State of Arizona in its opening brief before the Ninth Circuit Court of Appeals in Claridge and in the petition for certiorari in this Court. Both questions were decided adversely to the State. However, as noted, the Supreme Court of Arizona in its decisions holds just the opposite.

Furthermore, the Arizona Supreme Court decisions are in direct conflict with the decision of this Court in Hughes v. Washington, 389 U. S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438, decided December 11, 1967, wherein Mr. Justice Black delivered the opinion of the Court in reversing the Supreme Court of Washington and unequivocally holds that *federal, not state laws*, control the ownership of land, called accretion, on property conveyed by the United States prior to statehood. It is clear from reading this opinion

that the converse would be true; that is, *that federal law, and not state law, controls the ownership of land lost by accretion where the land was conveyed by the United States prior to statehood*, as is the fact in the case at bar.

II. *Importance of the Issue.*

Since the latter decision of the Arizona Supreme Court of April 13, 1972, there has been published in Volume 14, Number 2, of the Arizona Law Review published by the College of Law of the University of Arizona an article by Robert E. Lundquist entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion.*

While respective counsel to this petition may not fully agree or concur with Mr. Lundquist's article or his conclusions, we all unanimously agree that the article points to the fact that we have a very serious problem at hand as a result of the conflict between the Arizona Supreme

Court decisions and the decisions of this Court and subordinate Federal courts. Counsel believe that this article is of such significance and importance that it should be filed as a separate Appendix and therefore a reprint of the article is being separately filed as Appendix I.

Mr. Lundquist states on the first page of his article that dredging operations by the Bureau of Reclamation to rechannel parts of the Colorado River have already surfaced over 2,700 acres of land between the natural river bank and the narrower new channel and that *future dredging will expose more land*. Therefore, as dredging continues by the Bureau of Reclamation other land titles will be affected (page 316 Arizona Law Review, Appendix I).

According to the records of the Arizona State Office of the Bureau of Land Management, United States Department of the Interior, there are 273 miles of shoreline

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in Arizona along the Colorado River. Of this shoreline, 87 miles or 32% is controlled by the Bureau of Reclamation and the Bureau of Land Management; 59 miles or 22% is owned by Indians; 71 miles or 26% is controlled by the Bureau of Sports, Fisheries and Wildlife; and 45 miles or 16% is privately owned or owned by the State of Arizona. This statistical data and overlay is attached as Appendix E, *infra*.

In 1971 the Department of Economic Planning and Development-Planning Division-of the State of Arizona published an official report entitled *Ownership and Administration of Public Lands in Arizona* (see page 317 Arizona Law Review, Appendix I). As a pocket part of this official report is a map of the State of Arizona showing public land ownership in Arizona as of 1971. The land status was obtained from the Arizona State Office of the Bureau of Land Management, United States Department of the Interior.

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This map clearly shows the ownership of land along the Colorado River and is filed as Appendix F, *infra*.

Of the 45 miles or 16% of private and State land, Appendix E, *infra*, it is agreed that by virtue of the Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawal orders the State's ownership constitutes a very small portion of the area.

Justice Lockwood in her dissenting opinion of the first decision of October 4, 1971, at 489 P. 2d 706, mentions the agricultural developments bordering the Colorado River and its importance. The agricultural development is within Yuma County. However, millions of dollars have been expended by private capital and plans for the expenditure of other millions of dollars by public agencies, the Indians, the Federal government and individuals on lands along the Colorado River in Mohave County are of great

significance. This Court can take judicial notice of the birth and development of the great city along the Colorado River in Mohave County known as Lake Havasu City purchased and developed by the McCullough interests at which place at the cost of several million dollars McCullough purchased, transported and installed the London Bridge.

The Department of the Interior has made extensive studies and plans for the development of public and Indian lands along the Colorado River for recreational purposes which will make it one of the greatest recreational areas in the entire continental United States. (See *The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.* Extra copies of this document are not available because it is out of print, and therefore only one copy is available for filing with the

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Clerk. This plan as will be indicated therein is still in full force and effect.)

While Justice Struckmeyer in his latter opinion remarks on page 1313 of the reported decision, 495 P. 2d, that the economic impact of the court's decision is a matter of legislative consideration rather than the concern of the court, one of the very main reasons for this joint petition by opposing counsel is due to the fact that the Legislature of Arizona cannot intelligently consider legislation for the relief of private owners of land along the shoreline of the Colorado River due to the conflict between the decisions of the Arizona Supreme Court, this Court and those of subordinate Federal courts, particularly the conflict that now exists between the Claridge decision and the Bonelli decisions as to the extent of the State's ownership. We respectfully submit that only this Court by granting certiorari can provide the

solution.

The statistical data furnished by the Bureau of Land Management, Appendix E, *infra*, relate only to shoreline land without any information as to the depth of that shoreline land. In other words, an examination of Appendix D, *infra*, clearly shows that the extent of the Claridge decision would only affect a quarter mile or at the most a half mile of Bonelli shoreline land while the effect of the Arizona Supreme Court's decisions embrace all of the Bonelli land and extends a mile or more covering half of the Federal land in Sections 10 and 2. In some cases where the Colorado River is known to have flowed at one time for a distance of 4 or 5 miles to the east of the present channelized stream, the State's title would extend to this point.

The Arizona Supreme Court cited the Submerged Lands Act, 43 U. S. C., 1301 et seq., in its supplemental opinion (495 P. 2d

1312) as authority for title vesting in the State, but the Court refused to recognize that this same Act exempted from the provisions thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person, or to which title had been retained by or ceded to the United States when Arizona entered the Union.

Furthermore the Arizona Supreme Court in both of its decisions completely ignored the mandatory provisions of Section 20, Second, of the Enabling Act of Arizona and the effect of the unrevoked Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawals both before and after statehood which withdrew land along the Colorado River from any form of entry; particularly the January 13, 1903, withdrawal which withdrew 6 miles of lands from all forms of entry except homestead entries (not applicable here) from the center of the Colorado

River eastward. These withdrawals and the mandatory provisions of the Enabling Act and the Arizona Constitution accepting the same casts a serious cloud upon the validity of the Supreme Court of Arizona's decisions and as a result a serious cloud on any title to lands along the Colorado River now in existence or *which hereafter may be granted by the United States.*

CONCLUSION

Unless this Court takes jurisdiction and grants certiorari, it is submitted that the owners of patented lands along the Colorado River, the Indians and the Federal government will be in a complete state of confusion and apprehension.

Under the Arizona Supreme Court decisions there is no way for the owner of private land along the Colorado River to definitely determine how much of his land has been taken by the State of Arizona or affected by the decisions. As a result of the Arizona Su-

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by the State of Arizona or affected by
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preme Court decisions, no person can with any degree of safety and assurance of stability develop and improve his land at any one given point because of the vagueness and uncertainty of the decisions and the conflict with Claridge and of contemplated future channelization of the Colorado River by the Bureau of Reclamation to stabilize the river flow.

The Arizona Supreme Court by its decisions has adopted a rule of property which casts serious constitutional doubt upon the powers of the Legislature of Arizona to change or modify unless these decisions are reversed or at least modified and clarified by this Court.

It is therefore respectfully submitted that this petition for the writ of certiorari should be granted and counsel be permitted to file their respective briefs on the questions raised herein.

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, Arizona, 85004
Attorney for Petitioner Bonelli Cattle Company

LEONARD C. LANGFORD
Mohave County Attorney
Mohave County Court House
Kingman, Arizona, 86401
Attorney for Petitioner County of Mohave

[redacted]

Respectfully submitted,

ELMER C. COKER
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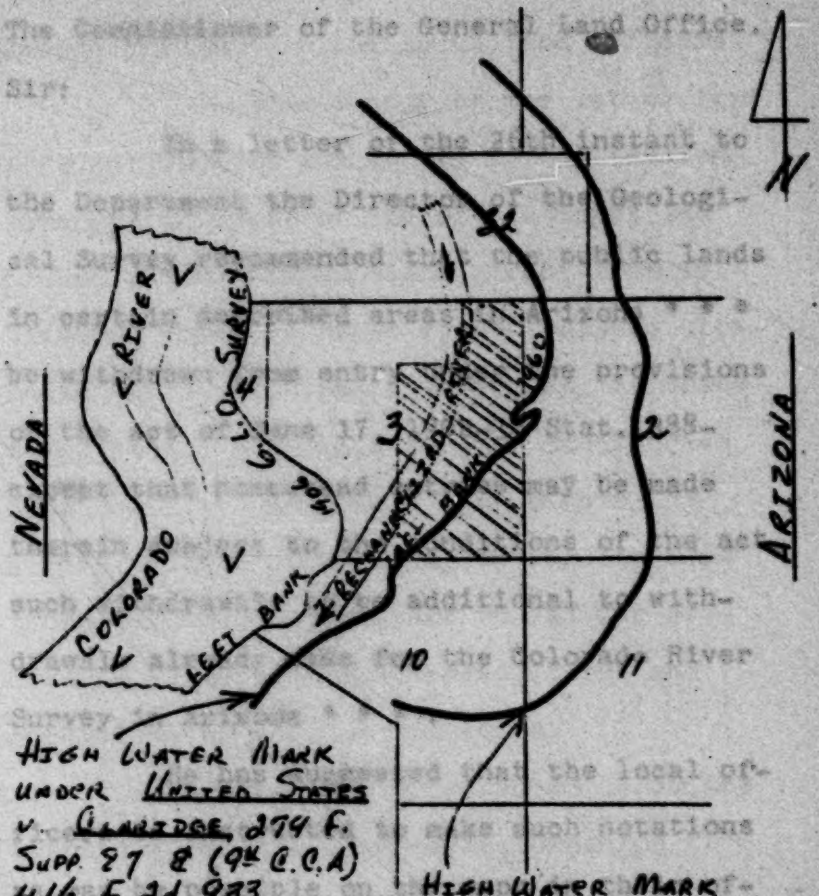
132 South Central Avenue
Phoenix, Arizona, 85004
Attorney for Petitioner Bonelli Cattl

LEONARD C. LAMPORD
Mohave County Attorney
Mohave County Court Hous
Kingman, Arizona, 86401
Attorney for Petitioner County

SUBJECT LAND -- PART OF SECTION 3, T. 19N., R. 22 W., G.& S. R.B.M.

▨ —— SUBJECT LAND



HIGH WATER MARK UNDER UNITED STATES V. CLAIRDGE, 274 F. SUPP. 87 & (9TH C.C.A) 416 F. 2d 983

HIGH WATER MARK UNDER ARIZONA V. BOURKE CATTLE COMPANY, 495 P. 2d 1312

Arizona
Colorado River
Yuma
Gila River
Yuma
Gila River
Yuma
Yuma
Yuma

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

January 31, 1903.

J. I. P.

The Commissioner of the General Land Office.

Sir:

In a letter of the 26th instant to the Department the Director of the Geological Survey recommended that the public lands in certain described areas in Arizona * * * be withdrawn from entry under the provisions of the act of June 17, 1902-32 Stat. 388- except that homestead entries may be made therein subject to the conditions of the act, such withdrawals to be additional to withdrawals already made for the Colorado River Survey in Arizona * * * .

He has suggested that the local officers be instructed to make such notations as may be possible on the maps in their offices, and has recommended with reference to the unsurveyed townships that the withdrawals should be noted in the tract books

of your office where the townships fall in tract books already opened and that whenever possible new tract books should be opened to contain the others and that like action be taken by the local land officers.

I enclose a copy of the letter for your information and hereby direct the temporary withdrawal of the public lands included in the descriptions given, from settlement, entry or other form of disposition under the public land laws except the homestead laws. All lands entered and entries made under the homestead laws within the limits of this withdrawal, during its continuance, shall be subject to all the provisions, limitations, charges, terms and conditions of the act mentioned.

You are also directed to cause the withdrawal of the unsurveyed townships to be noted as recommended if practicable.

Very respectfully,

E. A. HITCHCOCK
Secretary

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You are also directed to cause
withdrawal of the unsurveyed townships
be noted as recommended if practicable.

Very respectfully,

E. A. HITCHCOCK
Secretary

Request for additional withdrawals, Colorado River Survey.

Jan. 26, 1903.

The Honorable,

The Secretary of the Interior,

Washington, D. C.

Sir:

As a result of further examinations in the field I have the honor to request additional withdrawals to those already made for the Colorado River survey in Arizona * * *, under the provisions of the act of June 17, 1902 (32 Stat. 388), as stated below:

COLORADO RIVER SURVEY IN ARIZONA-G AND SRM

Ts. 7, 8, 10, 11, 12, 13 S, R. 20 W.

T. 11 S., Rs. 20, 21, 22, 23, 24 and 25 W.

T. 12 S., Rs. 19, 20, 21, 22 and 23 W.

T. 13 S., Rs. 18, 19 and 20 W.; also

All lands in Arizona lying within six miles of the Colorado River, west of the 114th Meridian.

* * * * * * *

Request for additional withdrawals, C
River Survey.

Jan. 25, 190

The Honorable,

The Secretary of the Interior,

Washington, D. C.

Sir:

As a result of further examin
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T. 13 S., Rs. 18, 19 and 20 W.; also

all lands in Arizona lying within six
of the Colorado River, west of the 114
Meridian.

* * * * * * *

In regard to the withdrawal of these unsurveyed townships and the lands along the Colorado River in Arizona * * *, I desire to state that the land being unsurveyed, it is impossible to make a more definite description. The most important object to be obtained by this withdrawal is to prevent the attachment of rights for reservoirs and canals, which will take water from the river for irrigation, power or other purposes, and it is understood that the progress sheets which are kept up in the General Land Office, will show the proposed withdrawals and make it possible to decide whether an application for such purposes may be in conflict therewith. It is suggested that the Commissioner of the General Land Office be asked to instruct the local land officers to make such notations as may be possible on the Land Office maps in their offices which are consulted in connection with applications

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struct the local land officers to make
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Land Office maps in their offices whic
communicated in connection with applicati

for rights of way over unsurveyed lands, as may show the locations of these withdrawals.

As to the unsurveyed townships described, it is recommended that the Commissioner of the General Land Office should note the withdrawals in the tract books in case the townships fall in books already opened and whenever possible should open new tract books to contain the others; also that a similar action be taken by the local land offices.

It is recommended that the public land in the area described be withdrawn from entry, except that homestead entries may be made therein subject to the conditions prescribed in the act.

Very respectfully,

(Name does not appear)

Director.

SUPREME COURT, U. S.

FILED

SEP 8 1972

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

~~72~~ 397

NO. _____

BONELLI CATTLE COMPANY, A California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents [redacted].

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

(APPENDIX A THROUGH F)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

(APPENDIX A THROUGH F)

APPENDIX - SUBJECT INDEX

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Appendix A.	Opinion of the Arizona Supreme Court, State of Arizona v. Bonelli Cattle Company, filed October 4, 1971 ----------	1a
Appendix B.	Opinion of the Arizona Supreme Court, State of Arizona v. Bonelli Cattle Company, filed April 13, 1972 ----------	1b
Appendix C.	Opinion of the United States Court of Appeals for the Ninth Circuit, United States v. Claridge, filed September 19, 1969 --	1c
Appendix D.	Map Showing Difference Between the High Water Mark and Bed of Colorado River as Fixed by Claridge Decision and as Fixed by Arizona Supreme Court Decisions in State of Arizona v. Bonelli Cattle Company as the Decisions Affect Subject Land (Same as Appearing on Page 33 of Petition)------	1d
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APPENDIX - SUBJECT INDEX CONTINUED

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Appendix F. Map of the State of Arizona Showing Public Land Ownership in Arizona as of 1971 (Land Status Obtained From the Arizona State Office of the Bureau of Land Management, United States Department of Interior)------ 1f

APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion* Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.

APPENDIX - SUBJECT INDEX CONTINUED

Appendix F. Map of the State of Arizona showing Public Land ownership in Arizona as of 1971. (Land status obtained from the Arizona State Office of the Bureau of Land Management, United States Department of Interior).------

APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled Article Entitled Adjudication Of Arizona Land: Extended and the Doctrine of Acceptance Contained in Volume 10, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report on the Proposed Future Land Use Adjustments, United States Department of the Interior, Robert L. Black, Secretary, January 1964.

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

En Banc

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Appellants,

v.

BONELLI CATTLE COMPANY, a California corporation,

Appellee.

No. 10030-PR
(October 4, 1971)

Appeal from the Superior Court of Pinal (sic) County

Honorable T. J. Mahoney, Judge

Reversed with Directions

Opinion of the Court of Appeals, Division One
11 Ariz. App. 412, 464 P. 2d 999

Vacated

Gary K. Nelson
The Attorney General Phoenix

by Dale R. Shumway
Special Assistant Attorney General
Phoenix

Attorneys for Appellants

Elmer C. Coker Phoenix
Attorney for Appellee

STRUCKMEYER, Chief Justice

This action was brought by Bonelli Cattle Company, a corporation, to quiet title to certain lands lying within the bed of the Colorado River in Mohave County, Arizona. The Superior Court on an agreed statement of facts entered judgment quieting title against the State and the judgment was affirmed by the Court of Appeals, 11 Ariz. App. 412, 464 P. 2d 999. Opinion of the Court of Appeals vacated. Judgment of the Superior Court reversed.

The issue to be determined is whether ownership of Arizona in the beds and banks of the Colorado River acquired by erosion has been lost because dredging has channelized the water of the river, confining it to a part of the bed.

Bonelli claims as the owner the East half of Section 3, Township 19 North, Range 22 West of the Gila and Salt River Base and

Meridian. It acquired title by deed dated August 12, 1955. Its grantor traces its title to a patent by the United States dated November 5, 1910 issued to Santa Fe Pacific Railroad Company.

A United States Geological Survey map of this area dated 1902-1903 shows that at that time the river's east bank was approximately one-quarter of a mile west of Section 3. No evidence was produced as to the course of the river thereafter until 1938, but there seems to be general agreement that during this period the river moved steadily eastward. By April 24, 1938 the river's channel covered all of the east half of Section 3 except a small portion of the southeast corner.

In the year 1938, the flow of the river was brought under control by the construction of the Hoover Dam, and thereafter water was released only in such quantities as was suitable for downstream irrigation.

This discharge of water apparently has not been sufficient to cause any significant erosion or reliction in the river. By a map of the United States Geological Survey, Department of Interior, (the Davis Dam Quadrangle) dated 1950, the river is shown as being nearly three-fourths of a mile wide, flowing in part over the west half of Section 3. In 1959 and 1960 the river was dredged by the United States Department of Interior and the water which had theretofore spread over almost the entire width of the river's bed was confined to the dredged portion, principally within the west half of Section 4 and only partially within the east half of Section 3. That part of the former channel on the east half of Section 3, over which water no longer flows, is the subject matter of this controversy. The plaintiff, Bonelli, is claiming the exposed portion of the bed of the river.

Ordinarily in the United States the bed of a non-navigable river or stream is

owned by the riparian owners. Where the stream forms the boundary between owners, each owns on his side to the middle thread. However, the rule is not always applied to navigable rivers. By congressional enactment, the State of Arizona owns title to the beds of all navigable streams within its border, 67 U. S. Stat. 30, 43 U.S.C. §1311; Kansas v. Colorado, 206 U.S. 46, 51 L. Ed. 956, 27 S.Ct. 655. Since the Colorado River is not wholly within Arizona's borders, but is, itself, the border, Arizona's title extends from the center of the channel eastward to the river's high water line. Arizona v. California, 283 U.S. 423, 75 L. Ed. 1154, 51 S.Ct. 522; and see Mumford v. Wardwell, 73 U.S. 423, 18 L. Ed. 756; Pollard v. Hagan, 44 U.S. 212, 11 L. Ed. 565; Morgan v. Colorado Indian Tribe, 103 Ariz. 425, 443 P. 2d 421. As an aside, it may be observed that the boundary between Arizona and Nevada is not the channel's

thread. The boundary has been fixed by agreement between the two states.

It is common knowledge that rivers move sometimes so slowly as to be imperceptible during the lifetime of any single individual, and sometimes so rapidly by floods that the river's banks visibly disintegrate. Where the change is sudden and rapid, the change is said to be by avulsion. U. S. v. Claridge et al., U. S. District Court, Phoenix, Civ. 5080; Hirt v. Entus, 37 Wash. 2d 418, 224 P. 2d 620. Erosion, on the other hand, is the eating away of the soil by the river's current, and is a gradual, imperceptible process. Where the river moves by erosion, the boundary moves with the stream, but where the river moves by avulsion, the boundary remains in the center of the old channel, Nebraska v. Iowa, 143 U.S. 359, 36 L. Ed. 186, 12 S. Ct. 396; State v. Jacobs, 93 Ariz. 336, 380 P. 2d 998.

From the statement of facts and the

exhibits introduced in the instant case, we are unable to say whether the eastward movement of the Colorado River between 1903 and 1938 was by avulsion or erosion. It is to be recognized that avulsive changes are generally events so momentous that evidence is available to establish them. In the instant case, the failure to produce such evidence is an indication that the changes in the watercourse were imperceptible. The rule of law is that in the absence of clear evidence to the contrary, the movement of the river will be presumed to be by erosion, Arnd v. Harrington, 227 Iowa 43, 287 N.W. 292; Kitteridge v. Ritter, 172 Iowa 55, 151 N. W. 1097.

It follows from what has been said that as the river moved eastward across Section 3, the thread of its channel moved with it and the title of the State of Arizona to the east one-half of the river bed also shifted correspondingly, -- the east high water line of the river finally becoming the plain-

tiff's west boundary. As the river moved eastward, engulfing most of Section 3 in the channel of the river, the land to which plaintiff held title decreased so that, by 1938, the owners of the east one-half of Section 3 had, by the operation of natural forces, lost most of it to Arizona.

It is Bonelli's position that when the United States Government dredged the river in 1959, confining the waters thereof to a portion of the river's bed so as to prevent unreasonable loss of water by absorption and evaporation, the portion of the bed which was not used for the flow of water reverted to the previous owners. But we do not think so.

A stream is a watercourse having banks and channel through which waters flow, at least periodically. Southern Pacific Co. v. Proebstel, 61 Ariz. 412, 150 P. 2d 81. As has been said:

"A watercourse does not lose its character as such by reason of the fact that it is

> improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period * * * nor by reason of the fact that the water has all been dammed at a place far up the stream.* * * * " (Emphasis in original.) Smith v. City of Los Angeles, 66 Cal. App. 2d 562, 153 P. 2d 69.

Obviously, a river does not have to flow continuously across the whole of its bed to the high water mark in order to avoid a claim by abutting owners to a part of the river's bed. The channel of a river is the bed of the stream over which its waters run, Benjamin V. Manistee River Imp. Co., 42 Mich. 628, 4 N.W. 483, and the bed of a river is the space contained between its banks, Pulley v. Municipality No. 2, 18 La. 278. Arizona does not lose title to the bed of the river to high water mark simply because the river has been dammed and its water channelized to a part of the bed.

The plaintiff argues what it calls the "artificial accretion" theory, urging

that an abutting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a "gradual and imperceptible accumulation of land by natural causes," Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually or imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly.

The plaintiff also argues what it calls the "re-emergence" theory. This occurs where a river which formerly eroded an abutting owner's land recedes so that the eroded land reappears -- a process known as reliction. Reliction is an increase of land by a permanent withdrawal or retrogression of a river. We believe, however, that the dredging of the river is an engineering relocation of the waters of the river by artificial means and is not a true case of with-

that an abutting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a "gradual and imperceptible accumulation of land by natural causes," Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually or imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly.

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drawal or retrogression.

We are not unaware that there are jurisdictions which have held that the land to the low water mark of a river or lake belongs to the abutting owners, see e. g., State Engineer v. Cowles Brothers, ___ Nev. ___, 478 P. 2d 159. We think, however, the better rule is that the courts have no authority to give away the title to land which clearly belongs to the state. Where, as here, the abutting owner's title extends only to the high water mark, and the beds and banks belong to the state, we can find no solid legal reason for concluding that the land below the high water mark to the water's edge belongs to the abutting owners.

Where a river shifts to a new location as a result of unnatural forces, the state does not lose title to the bed of the stream in the old location. People v. Shasta Pipe and Supply Co., 70 Cal. Rptr. 618; Padgett v. Central and Southern Florida Flood

Control District (Fla.), 178 So. 2d 900; State v. Aucoin, 206 La. 786, 20 So. 2d 136; Ray v. State (Tex.), 153 S.W. 2d 660; Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex.), 264 S.W. 2d 543 (cert den. 348 U.S. 829).

The judgment of the Superior Court is reversed with directions to enter judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark.

HAYS, V. C. J., ROBERT O. ROYLSTON, P. J., Superior Court Pima County, WARREN L. McCARTHY, J., Superior Court Maricopa County, concur.

NOTE: Justices JESSE A. UDALL and JAMES DUKE CAMERON having announced their disqualification to sit in the determination of this matter, the Honorable ROBERT O. ROYLSTON and Honorable WARREN L. McCARTHY were called to sit in their stead.

LOCKWOOD, Justice (Dissenting):

I cannot concur with the result at which Chief Justice Struckmeyer arrives in this case.

Chief Justice Struckmeyer has amply set forth the facts in the case, and his discussion of rights of a riparian proprietor in land under the common law is an excellent dissertation up to a point.

It must be borne in mind, of course, that the question here involves not the right to the use of the water of a river or stream, but involves the title to land bordering on, or beneath such river or stream. In the case of use of the water, the common law riparian right of owners of land bordering the river or stream was abrogated and the doctrine of prior appropriation established by the First Territorial Legislature in 1864 and has obtained by statute and Arizona Constitution ever since. But there are other "riparian rights" belonging to owners of land bordering rivers or streams unaffected by the Constitu-

tion and statutes regarding use of such waters by appropriation. There is no inconsistency in our constitutional and statutory provisions repudiating the doctrine of riparian rights and establishing the doctrine of prior appropriation (so far as the waters named by the legislative acts are concerned) and in the application of riparian rights in land owners to increase or decrease of land by accretion or reliction. See Water Conservation Dist.No. 1 v. Cotton Co., 39 Ariz. 65, 4 P. 2d 369; State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P. 2d 352.

As early as 1864 the Arizona Territorial Legislature first enunciated the policy of adoption of the common law as "the rule of decision" and as modified by subsequent legislative acts, that rule has obtained to the present. We must, however, examine to what extent the common law has become a fixed "rule of decision". An examination of succeeding legislative enactments is

therefore illuminating.

A.R.S. §1-201 presently reads as follows:

"The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decisions in all courts of this state." (Emphasis added.)

The Territorial Legislature in 1864 adopted §7 of Chapter 61, which reads as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory."

The same statutory provision was carried forward appearing as §3438 of the Compiled Statutes of 1877, as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be therule of decision in all

the courts of this Territory."

In 1887 the statutes were revised. The provision adopting the common law was significantly modified to read as follows:

> "The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the constitution of the United States, or bill of rights, or laws of this territory, or established customs of the people of this territory, is hereby adopted and shall be the rule of decision in all the courts of this territory." (Emphasis supplied.) R.S.A. 1887 §2935.

Thereafter a new code was enacted in 1901 by the Territorial Legislature. Therein all statute laws and titles of the Revised Statutes of 1887 were repealed (except a certain Title 3 regarding assignment for benefits of creditors, not here relevant.) In this revision no general adoption of the common law as "the rule of decision" was adopted. The only reference thereto was regarding evidence, reading:

> "The common law as now practiced and understood shall in its application to evi-

dence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this title or any other law." Section 2533, R.S.A. 1901.

However, the Territorial Legislature of 1907 on March 5th adopted Chapter 10, which was entitled "To Revive Chapter Five of Title LX of the Revised Statutes of 1887." In Chapter 10, §8, the Legislature reenacted in practically identical wording former §2935 of the Revised Statutes of 1887, reading as follows:

> "The Common Law, so far only as it is consistent with, and adapted to the natural and physical condition of this Territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all courts of this Territory." Session Laws of the 24th Legislative Assembly of the Territory of Arizona of 1907, Chapter 10, §8, p. 11 (Emphasis supplied.)

In the first State Code adopted in 1913, §5555 is practically identical to the 1907 provision. The same statute was carried forward in the 1928 Code as §3043, and there-

dence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this title or any other law." Section 2933, R.S.A. 1901.

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In the first State Code adopted in 1913, §5555 is practically identical to the 1907 provision. The same statute was carried forward in the 1928 Code as §3043, and there

after it was carried forward without change to the present §1-201, A.R.S. 1956, still in effect.

The First Territorial Legislature, in 1864 had responded to the urging of Governor Goodwin that they "adopt a permanent policy as to the use of water for agriculture as well as mining purposes." The Legislature adopted Article 22 of the Bill of Rights, reading as follows:

> "All streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation, are hereby declared to be public property; and no individual or corporation shall have the right to appropriate them exclusively to their own private use except under such equitable regulations and restrictions as the Legislature shall provide for that purpose."

Immediately thereafter the language, supra, of Chapter 55 of the Howell Code was enacted, which also established the policy of appropriation as opposed to riparian rights in waters of rivers, creeks and streams of running water in the Territory of Arizona. Thereafter, in the case of Boquillas Land

after it was carried forward without change to the present §§ 2-201, A.R.S. 1956, still in effect.

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Therefore, in the case of Bopullins Land

and Cattle Co. v. St. David Coop. Assn., 11 Ariz. 128, 89 Pac. 504 (filed March 22,1907) affirmed 213 U.S. 339, 29 S. Ct. 493, 53 L. Ed. 822 (1909), the right of the state to abrogate the common law rules of riparian rights to the use of water, and to establish the right of appropriation of water was upheld. The Court discussed the development of the custom of using irrigation water by right of appropriation without regard to the riparian character of the lands being in force by virtue of Mexican Law before the acquisition of the State of Arizona under the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. The Court stated: "Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law, as modified by custom." 11 Ariz. at 139, 89 Pac. at 508.

In a concurring opinion outstanding for its brevity and clarity, Territorial Supreme Court Judge Nave commented on the com-

mon law as follows:

"The essence of the common law is flexibility and adaptability. It is not a body of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life, as, from time to time, they are brought before tribunals. Hence, though the common law is homogeneous, yet it finds widely different expression in different jurisdictions. Should the common law become so crystalized that its expressions must take the same form, wherever the common law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be but an inelastic and arbitrary code. The common law historically has carried with it, and as part of it, the principle that precedents -- earlier deductions from known conditions -- must yield to the reason of different or modified conditions. This is expressed, and analogously applied in People v. Appraisers, 33 N. Y. 461, where it is said: 'No doctrine is better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes, not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails.'" 11 Ariz. at 140, 89 Pac. at 508.

And in Maricopa County Municipal

Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, the Court paraphrased the language of Judge Nave and stated:

"It is true that the common law is not in its nature and character an absolute, fixed, and inflexible system; it is rather a system of general juridical truths, founded on reason, natural justice, and enlightened public policy, which are conditionally explained with the progress of society, and which adapt themselves to the gradual changes of that society and the conditions, exigencies, and usages of the country. It is never entirely stationary, but is modified and extended by analogous construction and custom so as to embrace new relations springing up from time to time from an amelioration or change of society, or different physical conditions arising in the countries to which it is to be applied. Should it ever become so crystallized that its expressions must take the same form, irrespective of physical, social or other conditions, peculiar to the locality or the character and habits of the people, it would cease to be the common law, and become a rigid and arbitrary code. And we think, as suggested by the Supreme Court of the United States in Boquillas etc. Co. v. St. David etc. Assn., supra, the doctrine of liberal interpretation set forth in paragraph 2935, supra, was equally implied in the Howell Code. But no judicial interpretation of the common law can ever prevail against an explicit declaration of public policy made by the legislature when acting within its jurisdiction. This declaration we have seen was made in the Bill of Rights and

Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, the Court paraphrased the language of Judge Haws and stated:

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the Howell Code, and it has never been changed in substance up to the present." 39 Ariz. at 81, 82, 4 P. 2d at 375.

The question here involved is one of first impression, and one on which our Legislature has never spoken through its statutory powers. But I believe in view of the importance of the agricultural developments bordering the Colorado River, and our constitutional policy prohibiting a taking of private property without just compensation, our decision should not be based on a construction of common law out of harmony with the conditions and usages of a burgeoning agricultural industry which flourishes most effectively by its use of land bordering the Colorado River.

It is well established that upon the formation of each new state in the Union, it became the owner of the navigable rivers therein together with the land underlying such waters. Under Joint Resolution No. 8 (21 August 1911) 37 U. S. Stat. 39, Congress

authorized the admission of Arizona with other States of the Union upon an "equal footing". Therefore the State of Arizona acquired sovereignty over the navigable rivers within its borders, together with the land underlying the same. The Colorado River, at the location in question here, is a navigable river by adjudication. Arizona v. California, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522. No new rights were conferred by Congress in 67 U. S. Stat. 29, 43 U. S. C. §1301, such statute merely confirming as a "quit-claim" all previous rights in navigable rivers. People v. Hector, 179 Cal. App. 2d 823, 4 Cal. Rptr, 334 (1960). Since the Colorado River formed the boundary between Arizona and the states of California and Nevada, the sovereignty of Arizona extended only to the middle of the stream of the Colorado River on such boundary, and eastward to the river's high water line, at the time Arizona became a state. Owners of

land abutting the river owned only to the high water mark, under the common law. As to their rights upon a change in the river's banks, the common law rule with regard to accretion and reliction was not necessarily in conflict with Arizona law. The nature of the title to the riverbed so acquired, however, is another matter. As stated in State v. R. E. Janes Gravel Co., 175 S. W. 2d 739 (Tex. Civ. App. 1943; reversed on other grounds in Manfrais v. State, 142 Tex. 559, 180 S. W. 2d 144 (1944), "the title to a riparian owner is 'a base fee, determinable upon the occupancy of his soil by the river,' and that the title of the State to the riverbed is likewise a 'base or qualified' fee, 'determinable in favor of the riparians upon the abandonment of the bed by the river.'" 175 S. W. 2d at 741.

This holding is entirely consistent with the provision in our Constitution that no private property should be taken or dam-

aged for public or private use without just compensation having been first made. Article 2, §17, Arizona Constitution. The state properly has a governmental interest in the control of the navigable river, and therefore in the land beneath it, so long as the river covers the land of a riparian proprietor. However, it is when the river is withdrawn from land originally owned by the riparian proprietor that governmental interest ceases to exist. It is more consistent with Article 2, §17 of our Constitution that the riparian proprietor's property right, hitherto subjected to the qualified fee of the state by the accretive movement of the river, should be completely restored to him; otherwise there is a taking by the state of private property for public use without just compensation. To permit the state to retain title to the property under such circumstances would controvert the provision of the Constitution.

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To hold, as I believe we should, that the state's qualified title is terminated, and the riparian proprietor's title is released from its subservience, is in harmony with and is not repugnant to or inconsistent with the provisions of Article 2, §17, supra, or of A. R. S. §1-201.

Supporting this conclusion, Michigan has held that riparian land rights are property for the taking or destruction of which by the state compensation must be made. Klais v. Danowski, 373 Mich. 262, 129 N. W. 2d 414 (1964):

"The question is raised whether the patentees and those claiming under them have lost from the then dry lands originally patented to them title to so much of the private claims as, subsequent to the date of patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative is supported by Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, In re City of New York, 256 N. Y. 217, 176 N. E. 171, In re City of New York v. Realty Associates, 256 N. Y. 222, 176 N. E. 173, and City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. The owner's continuing title and ownership, after the lands became submerged and, thereafter, when their restora-

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Supporting this conclusion, Montana has held that riparian land rights are property for the taking or destruction of which by the state compensation must be made. Kiva v. Dunsweil, 373 Mont. 262, 189 N. W. 24 413 (1964):

"The question is raised whether the patentees and those claiming under them have lost from the time dry land origin-ally patented to them title to so much of the private claims as, subsequent to the date of patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative is supported by Muley v. Morton, 100 N. Y. 424, 3 N. E. 281, In re City of New York, 256 N. Y. 219, 176 N. E. 377, In re City of New York v. Realty Associates, 256 N. Y. 222, 176 N. E. 379, and City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. The owner's continuing title and ownership, after the lands became submerged and, thereafter, when their restora-

tion to dry condition results either from natural forces or even by artificial, man-made means, is indicated by these cases. We hold to that same effect." 373 Mich. at 276-277, 129 N. W. 2d at 421 (Emphasis supplied.)

Likewise the State of California has held that all of its navigable waterways and the lands lying beneath them are held by the state "as trustee of a public trust for the benefit of the people". Colberg, Inc. v. State, 67 Cal. 2d 408, 62 Cal. Rptr 401, 432 P. 2d 3 (1967), cert. den. 390 U. S. 949 (1968) citing People v. Gold Run D. & M. Co., 66 Cal. 138, 151, 4 Pac. 1152 (1884); Martin v. Wadel, 41 U. S. (16 Pet.) 367, 10 L. Ed. 997 (1842); Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Miramar Company v. City of Santa Barbara, 23 Cal. 2d 170, 143 P. 2d 1 (1943). The law with regard to the sovereignty of California over navigable streams was early declared in the case of Eldridge v. Cowell, 4 Cal. 80 (1854), in the following language:

"She (the State of California) holds the

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"The (the State of California) holds the

complete sovereignty over her navigable bays and rivers, and although her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship." 4 Cal. at 87.

In Colbert, Inc. v. State, supra, the Supreme Court of California stated as follows:

"As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse. We are of the further view that the law of California burdens property riparian or litoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that 'when the act (of the state) is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.' (Gray v. Reclamation District No. 1500, supra, 174 Cal. 622, 636, 163 P. 1024, 1030.)" (Emphasis supplied.)

complete sovereignty over her navigable bays and rivers, and although her ownership is by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship." 4 Cal. at 87.

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The State of Texas departs somewhat from the English Common Law as to rights of riparian proprietors in land abutting on navigable rivers when the river has abandoned its course through either avulsive or accretive processes. When the Republic of Texas was formed, by treaty with Mexico, it agreed to protect existing property rights of owners under various Mexican land grants. Nevertheless in 1840 the Republic of Texas adopted the Common Law as the rule of decision with certain exceptions as to rights in certain Mexican land grants. In the landmark case of Manry v. Robinson, et al, 56 S. W. 2d 438, 122 Tex. 213 (1932), a most illuminating discussion of the development of rights of riparian owners in and to land, is found. The Court there traced the development of riparian land rights from their inception in Roman law (commonly referred to as the civil law) through the adaptations of the civil law by the various countries into

which it was carried by the Romans. These of course included England, France, Spain and Mexico, and our own country. The Laws of England with reference to rivers was founded upon the Roman Law but with adaptations to meet the conditions existing in England. Similarly, France, Spain, Mexico and the various states in the United States adopted interpretations best adapted to their physical conditions and customs.

The development of the law with regard to rights of riparian proprietors in the States of California and Texas were strongly influenced by the fact that the title to much of the land derived from Mexican land grants. Some of the land within the boundaries of the now State of Arizona, also derived title from Mexican land grants. Likewise, having been a part of Mexico, Arizona was subject to many of the same customs which arose out of Mexican law, which in general followed the civil law. Boquillas,

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supra.

With regard to the development of laws with reference to rivers, from Roman Civil Law through the English Common Law, and its various adaptations in our Southwest, we quote from the historical account given in Manry, supra:

"There can be no doubt but that the laws of England with reference to rivers were founded upon the Roman law. Authorities supra and post; Hardin v. Jordan, 140 U. S. 371, 390, 11 S. Ct. 808, 35 L. Ed. 428. The two systems of law were similar in many respects, but differed in some material particulars. Under the civil law, all perennial streams were public, while under the common law navigable streams within tidewater limits only, in the absence of prescription, dedication, or act of Parliament, were public. Authorities supra; Gould on Waters (3d Ed.) §§51, 52, 53; Coulson & Forbes on Waters (4th Ed.) pp. 77, 78, 449, 450; Halsbury's Laws of England, vol. 25 p. 398, §760; Hardin v. Jordan, 140 U. S. 371, 383, 11 S. Ct. 808, 35 L. Ed. 428.

"There is a difference of opinion among writers on the Roman law as to whether or not the beds of public streams under that system of jurisprudence belonged to the sovereign or to the owners of adjacent land.

"England in adopting the Roman law as to its nontidal streams adopted the construction insisted on by Selden, Vinnius,

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Mr. Farnham (vol. 1, §49), and others, that the title of the riparians extended to the center of the streams, because that construction was suitable to her conditions; while France, Spain, and Mexico adopted that interpretation indicated by Gaius (Scott's Civil Law, vol 9. p. 107), and followed generally by the American courts (Farnham, vol. 1, §49), that title to the beds of all navigable streams, so long as occupied, was in the public or the sovereign, because that construction was suitable to their conditions.

"Each of the nations named in selecting its interpretation of the Roman law as to the ownership of stream beds, so long as occupied chose that rule which was best suited to its conditions. The jurisprudence of all the nations mentioned, France, Spain, Mexico, Texas (down to 1840), and England (as to nontidal streams), however, agree with the Roman law, that when a river abandons its bed and selects a new channel, the abandoned bed becomes the property of the adjacent land owners. Authorities supra; Farmham on Waters, vol. 1, §49." 56 S. W. 2d at 446, 122 Tex. at 230-231. (Emphasis supplied.)

* * * * * * *

"Under the English common law the sovereign owned only those portions of river beds which were within tidewater limits. River calls extended to the medial line of boundary streams above tidewater, whether navigable or not, and the beds were the property of the riparians. Hardin v. Jordan, 140 U. S. 371, 383,388, 11 S. Ct. 808, 35 L. Ed. 428; Shively v. Bowlby, 152 U. S. 1, 11, 14 S. Ct. 548, 38 L. Ed. 331; 4 Ruling Case Law, p. 82,

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¶¶12, 13; p. 83, ¶15; 9 Corpus Juris, p. 184, ¶60, p. 185, ¶61; Farnham on Water Rights, vol. 1, ¶48, vol. 2 ¶¶ 413, 415; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43; 27 Ruling Case Law, p. 1358, ¶¶268, 272; 9 Corpus Juris, p. 184, ¶59; p. 185, ¶¶61, 63; Packer v. Bird, 137 U. S. 661, 666, 11 S. Ct. 210, 34 L. Ed. 819; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Kent's Commentaries (13th Ed.) vol. 3, pp. 592, 593; Coulson & Forbes Law of Waters (In England), pp. 91, 77; Halsbury's Laws of England, vol. 28, ¶¶744, 756, 757.

"The beds of navigable streams above tidewater were parts of the coterminous estates, but so long as occupied by navigable waters the ownership and control by the owners was limited by the public right of navigation, predicated upon custom, dedication, or act of Parliament, but not upon original ownership and control by the sovereign, nor upon the common law. Halsbury's Laws of England, vol. 28, p. 406, ¶784; p. 398, ¶¶ 760, 761, 762; p. 396, ¶756; Coulson & Forbes on Waters (4th Ed.) p. 450; Hale's De Jure Maris as published in Moore's History and Laws of the Foreshore, etc. (3d Ed.) p. 370 et seq.; Farnham on Waters, vol. 1, ¶48; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109, N. W. 744, 1 L. R. A. (N. S.)762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 743, 13 Ann Cas. 43." Id., 56 S. W. 2d at 445-446, 122 Tex. at 229. (Emphasis in original.)

* * * * * * * *

"These illustrations suffice to show that as to the law of streams we have only

adopted such rules of the common law as are suitable to our conditions and as are in harmony with the basic principles of our jurisprudence with reference to the law of waters.

"We will now examine the question as to whether or not we have adopted the claimed common law rule that the beds of all navigable streams upon abandonment are the property of the state.

"No such rule ever existed under the common law of England. There are respectable authorities for the statement that the beds of navigable streams within tidewater limits upon abandonment remain the property of the Crown; but this is because the rivers and their beds where the tide ebbs and flows are arms of the sea and not because of navigability alone. Authorities supra; Bacon's Abridgment, vol. 8, pp. 14, 19; Farnham on Waters, vol. 1, §38; Hale's De Jure Maris in Moore's History of the Foreshore, etc. (3d Ed.) pp. 378 to 380; Mayor of Carlisle v. Graham, L. R. Ex., vol. 4, p. 360.

"The rule of the common law as to rivers above tidewater, which are, as Bacon's Abridgment says, 'no original part or appendix of the sea,' was, and is that the adjacent lands extend to the medial line, burdened with certain easements incident to navigation, if navigable, and that upon abandonment of the beds in full title pass to the riparian owners. Authorities supra; Bacon's Abridgment, vol. 8, p. 14; Farnham on Waters, vol. 1, §48; Hale's De Jure Maris in Moore's History of the Foreshore, etc. (3d Ed.) pp. 370 to 373; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St.

Rep. 740, 13 Ann. Cas. 43.

"In our opinion, in adopting the common law, we adopted the last-named rule, since the rule to the extent that it assigned the beds of nontidal navigable streams upon abandonment to the riparians was consistent with our then established system of jurisprudence, and better suited to our conditions than the other rule of the common law stated above. Id., 56 S. W. 2d at 447-448, 122 Tex. at 233 (Emphasis in original.)

The United States government through its Bureau of Reclamation, without permission or consent from or by plaintiff or any express consent by the State (although there is an indication that the State approved the rechanneling project), changed the channel of the Colorado River by relocating and rechanneling it in the latter part of 1959 and the early part of 1960. This caused an abandonment by the river of a large portion of Section 3 which was originally owned, by virtue of United States patent, by those from whom plaintiff derived title. Under the customs established in Arizona Territory, by re-

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The United States Government through its Bureau of Reclamation, without permission or consent from or by plaintiff or any express consent by the State (although there is an indication that the State approved the reclaiming project), changed the channel of the Colorado River by relocating and reclaiming it in the latter part of 1939 and the early part of 1940. This caused an abandonment by the river of a large portion of Section 3 which was originally owned, by virtue of United States patent, by those from whom plaintiff derived title. Under the customs established in Arizona Territory, by re-

ference to Mexican law, the plaintiff would thereby have regained his land, bounded by the high water mark of the rechanneled river. Otherwise, the state, no longer having a governmental capacity over land formerly existing by virtue of its being beneath a navigable river, would be in effect taking property of plaintiff without compensation.

I would, for the foregoing reasons, affirm the judgment of the trial court quieting title in the plaintiff to the land in question.

LORNA E. LOCKWOOD, Justice

ference to Mexican law, the plaintiff would thereby have retained his land, bounded by the high water mark of the reclaimed river. Otherwise, the state, no longer having a governmental capacity over land formerly existing by virtue of its being beneath a navigable river, would be in effect taking property of plaintiff without compensation.

I would, for the foregoing reasons, affirm the judgment of the trial court quieting title in the plaintiff to the land in question.

JOSEPH E. LOCKWOOD, Justice

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

In Banc

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Appellants,

v.

BONELLI CATTLE COMPANY, a California corporation,

Appellee.

No. 10030-PR

(April 13, 1972)

Appeal from the Superior Court of Mohave County

Honorable T. J. Mahoney, Judge

SUPPLEMENTAL OPINION

Gary K. Nelson — Phoenix
The Attorney General

by Dale R. Shumway — Phoenix
Special Assistant Attorney General

Attorneys for Appellants

Elmer C. Coker — Phoenix

Attorney for Appellee

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Gary K. Nelson — Phoenix
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by Dale T. Shumway — Phoenix
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by W. E. Dolph, Esq.

Robertson, Molloy, Fickett & Jones, P. C. — Tucson
by Russell E. Jones, Esq.

Westover, Keddie & Choules — Yuma
by G. Thomas Choules, Esq.

Amici Curiae

STRUCKMEYER, Justice

Appellee Bonelli and others who have appeared as amici curiae have principally advanced economic reasons for rehearing our decision in State v. Bonelli Cattle Company, 107 Ariz. 465, 489 P.2d 699 (1971). Such are more properly matters of legislative consideration than the concern of a court

Shell & Milner Phoenix
by Maynard P. Gourly, Esq.

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Clayton & Pierson Phoenix
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Robertson, Molloy, Blakett & Tucson
Jones, P. C.
by Russell E. Jones, Esq.

Westover, Keddie & Choules Yuma
by O. Thomas Choules, Esq.

Amici Curiae

STRUCKMEYER, Justice

Appellee Bonsall and others who have appeared as amici curiae have petitioned for rehearing our decision in State v. Bonsall Cattle Company, 107 Ariz. 465, 489 P.2d 839 (1971). Such are more property matters of legislative consideration than the concern of a court

whose responsibility is to adhere to the law as it finds it so that rights will not depend on the personal idiosyncracies of its members or hang in suspense when economic considerations change.

We are concerned, however, with one possible area of misunderstanding. In our decision, we used the words "high water line" and "high water mark." In particular, we directed the court below to quiet title in Arizona from the Nevada line to the high water mark. The parties question the meaning of our use of the words "high water mark."

The title to all lands within the beds of navigable waters including all reclaimed lands which formerly were beneath navigable waters up to the ordinary high water mark was quit claimed in 1953 to the states by the Submerged Lands Act of Congress, 67 Stat. 29, 43 U.S.C.A. § 1301 et seq. The Act specifically included lands "heretofore

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or hereafter modified by accretion, erosion and reliction." Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging.

Congress, of course, could not constitutionally diminish the property rights of the states to the beds of navigable rivers as settled by over 100 years of decisions of the Supreme Court of the United States commencing with Pollard v. Hagan, 3 How. 212, in 1845. Most certainly, the United States government could not claim additional rights in the bed of a navigable river by the construction of dams and artificial channels. Nor do we find such an intent.

In considering Congress' language,

or meander modified by accretion, erosion and reliction. Beyond argument, title to land ownership of the beds beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1930 by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging.

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In determining Congress' language,

we take it that the word "ordinary" is used in its customary sense, meaning "not uncommon or exceptional," Webster's Third International Dictionary. This is confirmed by an examination of the opinions in Pollard v. Hagan, supra, and Goodtitle v. Kibbe, 9 How. 471.

In Pollard v. Hagan, the trial court in Alabama charged the jury that if it believed the premises sued for were below the "usual high water mark" at the time Alabama was admitted to the Union, then the plaintiffs acquired no title through patents of the United States government "whether the waters had receded by the labor of man only, or by alluvion." (Emphasis supplied.) The Supreme Court of Alabama affirmed the judgment entered on the jury's verdict and its judgment, in turn, was affirmed by the Supreme Court of the United States. In Goodtitle v. Kibbe, supra, the Supreme Court of the United States reconsidered the issues decided in Pollard v. Hagan and reaffirmed

its previous decision. There, the trial court instructed the jury that if plaintiff's land was below "ordinary high water mark" at the time Alabama was admitted to the Union, the confirming Act of Congress and the patent from the United States government conveyed no title. (Emphasis supplied.)

It is in the sense of the usual and ordinary that the words "high water line" and "high water mark" where used in our decision are to be understood.

It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge, 279 F.Supp. 87, aff'd 416 F.2d 933. The patent through which Bonelli Cattle Company claims title was issued by the United States November 5, 1910. The subsequent artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to the completion of the Hoover

Dam in 1938 and the later rechannelization by dredging. The condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the rights of the parties, although, of course, evidence of the river's condition thereafter may be illuminating.

Since Arizona's title to the bed of the Colorado River is the mark to which the water formerly rose at the time of or in the seasons of ordinary high water, and since we deem it desirable that any possible controversy be avoided, we approve for the purpose of determining the bed and banks this particular language of Justice Curtis concurring in Howard v. Ingersoll, 13 How. 381, 427:

> "(T)he banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water."

Further, we approve the definition of "high water mark" as applied to a natural channel by the Supreme Court of Iowa in State v. Sorenson, 222 Iowa 1248, 271 N. W. 234:

> "An accepted definition of 'high-water mark' is set out in the case of City of Cedar Rapids v. Marshall, 199 Iowa, 1262, loc. cit. 1264, 203 N.W. 932, 933, where this court said: "The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. (Citing case.)" 'High Water mark' means what its language imports -- a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes.' * * * Bennett v. National Starch Mfg. Co., 103 Iowa, 207, 72 N.W. 507;* * * Houghton v. C., D. & M.R. Co., 47 Iowa, 370.
>
> The high-water mark, therefore, may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes."

Our decision directing the Superior Court of Mohave County to enter

judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark as supplemented by this decision is approved.

HAYS, C. J., ROBERT O. ROYLSTON, Judge, Superior Court, Pima County, and WARREN L. McCARTHY, Judge, Superior Court, Maricopa County, concur.

NOTE: Justice James Duke Cameron and Retired Justice Jesse A. Udall having announced their disqualification to sit in the determination of this matter, the Honorable Robert O. Roylston and Honorable Warren L. McCarthy were called to sit in their stead.

LOCKWOOD, Justice (Dissenting): I dissent from the holding in the foregoing supplemental opinion which reaffirms the original decision ordering the title to the property involved quieted in the State of Arizona.

The reasons for my dissent are

judgment quieting title in the State of
Idaho from the Nevada boundary to the high
water mark as supplemented by this decree
is approved.

MAYO, C. J., ROBERT C. ROYLSTON,
Judge, Superior Court, Elmo County, and
WARREN L. MCCARTHY, Judge, Superior Court,
Marlowe County, concur.

NOTE: Justice Jesse Dunn Cameron and Retired
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nounced their disqualification to
in the determination of this matter
the Honorable Robert O. Moylston and
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called to sit in their stead.

LOCKWOOD, Justice (Dissenting):

I dissent from the holding in the
foregoing Majority opinion which recog-
nizes the original decision awarding the
title to the property involved quieted in
the State of Idaho.

The reasons for my dissent are

fully set forth, as attached to the original opinion. They are basically two-fold:

(1) The majority of the court justifies its decision by application of common law principles of rights of riparian land owners. In my opinion the common law is inapplicable because the principles adopted are not, pursuant to the statutory provisions of A.R.S. § 1-201, "consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof." (2) The decision violates the provisions of Article 2, § 17, Arizona Constitution, in that the result, i. e., permitting the state to acquire without compensation large quantities of property from private owners, constitutes a taking of the land for public use without just compensation having been made therefor.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD M. CLARIDGE and
KAY T. CLARIDGE, his wife, et al.

and

STATE OF ARIZONA, EX REL.,
OBED M. LASSEN,

Defendants-Appellants.

No. 22312

(September 19, 1969)

On Appeal from the United States District Court for the District of Arizona

Before: MERRILL and ELY, Circuit Judges, and KILKENNY, District Judge*

Per Curiam:

This action was instituted by the United States to quiet title to lands located on the Arizona side of the Colorado

* Honorable John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

River in the Palo Verde Valley. Judgment of the District Court was rendered in favor of the United States. 279 F.Supp. 87 (D.Ariz. 1967). From that judgment the defendants and the State of Arizona, as intervenor, have appealed. They assert that the lands in question are not in the public domain but that title thereto passed to the State of Arizona upon its becoming a state in 1912. They contend that at that time the lands were in the bed of the Colorado River[1] and remained there until the construction of Hoover Dam in 1935 reduced the width of the river.

The facts are fully stated in the opinion of the District Court. For the purposes of this appeal it is sufficient to state that appellants' theory is founded on the mistaken assumption that the annual spring floods of the river (suffered prior to the advent of Hoover Dam), which covered the valley from bluff to bluff, constituted

its "ordinary high water" and that the valley, from bluff to bluff, thus constituted the bed of the river. By eliminating these floods, appellants contend, the Hoover Dam caused an avulsive change in the flow of the river so that the United States as riparian owner did not take title to the flood plain.

Appellants' definition of "ordinary high water mark" is unsound. The District Court concluded, and we agree:

> "The ordinary high water mark of a river is the natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow." 279 F.Supp. at 91.

This is in accord with holdings of the Supreme Court. Oklahoma v. Texas, 260 U.S. 606, 635 (1923); Alabama v. Georgia, 64 U.S. (23 How.) 505, 515 (1859); Howard v. Ingersoll, 54 U S. (13 How.) 380, 415 (1851).

The District Court was therefore not in error in ruling that a precise loca-

tion of the high water mark at the time of Arizona's statehood was unnecessary. While the river unquestionably has meandered through the valley since that time, any change in its course has resulted from gradual erosion and not from avulsion, and the resulting accretion passes to the United States as riparian owner. Whether the Hoover Dam affected the course of the river is of no significance, for it did not result in avulsive changes and it was not constructed for the purpose of reducing riverbed holdings. 43 U.S.C. § 617. As this court stated in Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966):

> "The erecting of artificial structures does not alter the application of the accretion doctrine * * * unless, perhaps, structures are erected for the specific purpose of causing the accretion."

For the reasons set forth in the opinion of the District Court, judgment is affirmed.

FOOTNOTES

1. (Page 1 of Decision, Page 2c this Appendix) Confirming prior case law, the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §1301(a)(1), in effect quitclaims to the states "* * * all lands * * * covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, * * * up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *."

FOOTNOTES

1. [Page 1 of Resolution, Page 2a this
Appendix] Confirming prior case law, the
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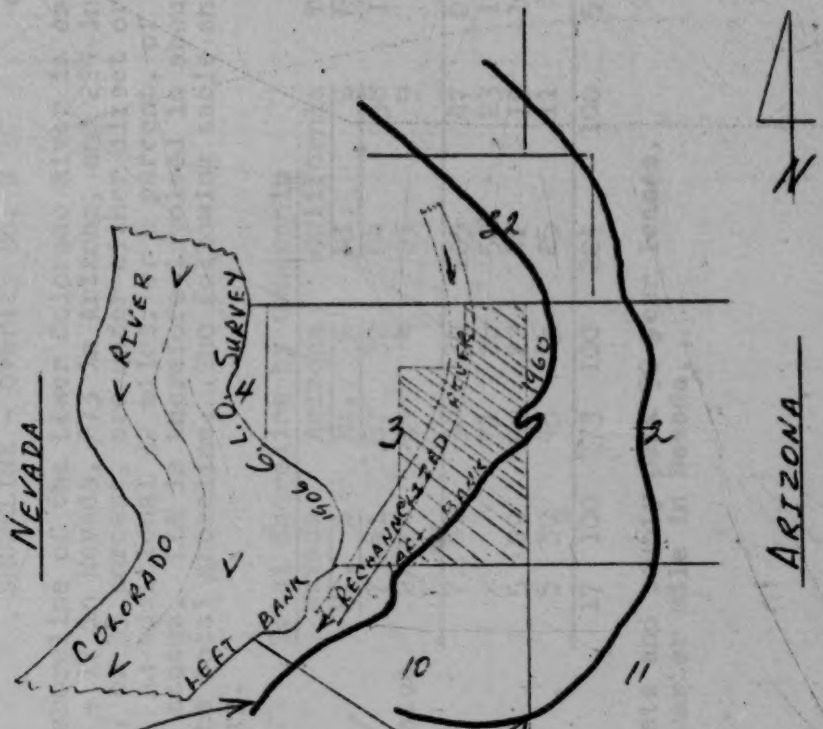
bordering on, or measured seaward by acc
tion, erosion, and reliction * * *."

APPENDIX D

The sketch on Page 2d of this APPENDIX D is a composite of the three sketches referred to by Judge Cameron in his decision of the Arizona Court of Appeals identified as Figures 2, 3 and 4, Pages 1000, 1001 and 1002, 464 P.2d, 11 Az. App. 412, et seq.

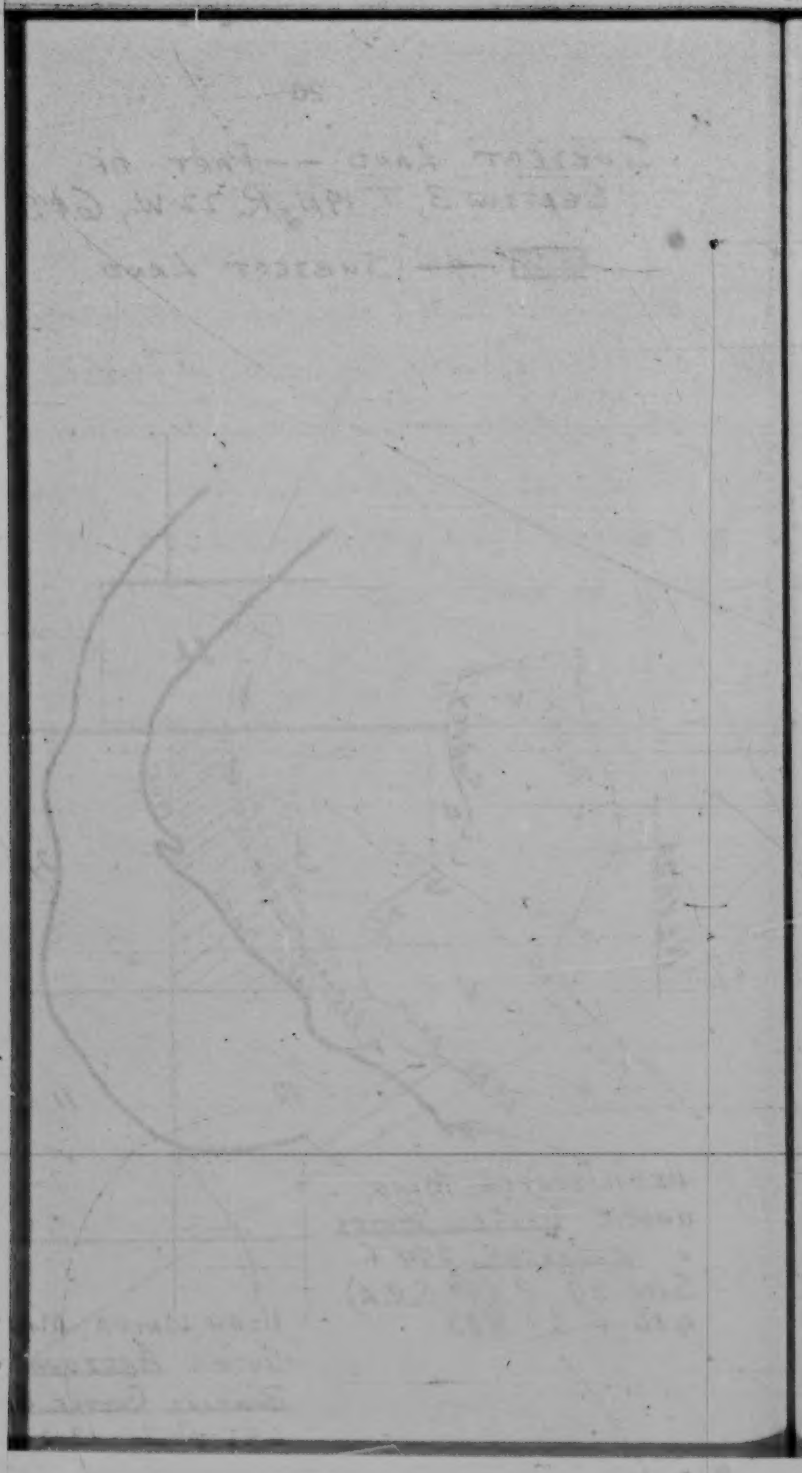
SUBJECT LAND -- PART OF
SECTION 3, T. 19N., R. 22 W., G&S. R.B.M.

▨ —— SUBJECT LAND



HIGH WATER MARK UNDER UNITED STATES V CLARIDGE, 274 F. SUPP. 87 & (9TH C.C.A.) 416 F. 2d 933

HIGH WATER MARK UNDER ARIZONA V. BONELLI CATTLE COMPANY, 495 P. 2d 1312



SHORELINE - Overlay No. 2

The total shoreline of the Lower Colorado River is estimated to be about 514 miles - 17 in Nevada, 273 in Arizona, and 224 in California. About 178 miles, or 35 percent, are under either direct or indirect BR-BLM management. An additional 32 miles, or 6 percent, of shoreline are in undetermined status. BLM is therefore involved in about 210 miles or 41 percent of the total shoreline. The following table shows shoreline by major category.

Total Shoreline by Ownership

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Bur.Recl.-BLM 1/	7	41	87	32	84	38	178	35
Undetermined status	2/	-	11	4	21	9	32	6
Subtotal	7	41	98	36	105	47	210	41
BSF&W			71	26	52	23	123	24
Indian	5	29	59	22	42	19	106	21
Private & State	5	30	45	16	25	11	75	14
Total	17	100	273	100	224	100	514	100

1/ Includes State and county park 50-year leases.
2/ About one-quarter mile in Nevada.

About forty miles, or 23 percent, of the BR-BLM shoreline are leased to states and counties for park purposes under 50-year leases. BLM responsibility on these lands is primarily lease compliance. Additional involvement includes minerals problems, rights-of-way, grazing, and burro management.

An additional fifty five percent of the BR-BLM shoreline is encumbered by a variety of leases, permits, trespasses and other special reservations as shown in the "Encumbrance of BR-BLM Shoreline" table. About 39 miles, or 22 percent, of the BR-BLM shoreline remain unencumbered. About thirty percent of this is topographically marginal for major development.

Encumbrance of BR-BLM Shoreline

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Nev.Colo. R. Comm.	7	100					7	4
State & Co. Park leases (50-yr.)			29	33	11	13	40	23
Wildlife Mitigation			5	6			5	3
BR Opn. & Security zones			3	3	10	12	13	7
Proposed Ind. leases					17	20	17	10
Concession leases (20-yr.)			2	2	2	2	4	2
Cabin Site leases (20-yr.)			1	1	3	4	4	2
Permits (Ag., Resid., Comm.)			2	2	15	18	17	10

Encumbrance of BR-BLM Shoreline (Continued)

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Agric. Trespass			4	5	4	5	8	4
Private Legislation			1	1	5	6	6	3
International Boundary Res.			18	21			18	10
Unencumbered			22	26	17	20	39	22
Subtotal	7	100	87	100	84	100	178	100
Undetermined Status			11		24		32	
Total	7		98		105		210	

FOLD OUT IS TOO LARGE TO BE FILMED

SEP 8 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-3971

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents [redacted].

APPENDIX I

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Reprint of an Article by Robert E. Lundquist Entitled Artificial Additions to Riparian Land: Extending the Doctrine of Accretion Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

ARIZONA LAW REVIEW

Artificial Additions to Riparian Land: Extending the Doctrine of Accretion _____ *Robert E. Lundquist*

College of Law
University of Arizona

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Note

Artificial Additions to Riparian Land: Extending the Doctrine of Accretion

Robert E. Lundquist

The banks of rivers are rarely, if ever, immobile. A fast flowing river will create erosion of the banks which will be carried as particles in suspension, while a gentle flow will cause deposition leading to accretion. If the volume of flow decreases, lands will be re-exposed or relicited. Twists and turns in the river channel will cause erosion on one bank and accretion on the other; if the terrain steepens or flattens, river speeds will vary with a concomitant variation in the rate of erosion or accretion. Naturally, innumerable combinations of these factors lead to a myriad of results.

Ownership of losses and additions caused to lands by these natural phenomena is governed by various water rights doctrines including accretion, avulsion, reemergence, and navigability. A further complication arises, however, when the actions of man serve as a catalyst for natural bank movements. Some jurisdictions distinguish between natural and artificially induced losses and gains, while others make no distinction and apply the same doctrine to both types of situations.

Dredging operations by the United States Bureau of Reclamation to re-channel parts of the Colorado River,[1] which is navigable,[2] have already surfaced over 2,700 acres of land between the natural river

1. The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western boundary of the State of Arizona. In certain areas along the river, the boundary between Arizona and the States of California and Nevada is set by agreement; thus the middle thread of the river may or may not coincide with the actual boundary. *See* State v. Bonelli Cattle Co., 107 Ariz. 465, 467, 489 P.2d 699, 701 (1971), *modified*, 108 Ariz. —, 495 P.2d 1312 (1972).

2. See text accompanying notes 28-31 *infra*.

bank and the narrower new channel.[3] Future dredging will expose more land. In a recent case of first impression, *State v. Bonelli Cattle Company*,[4] the Supreme Court of Arizona declined to extend the doctrine of accretion to man-made additions to riparian land. Instead it chose to ignore all the reasons underlying the development of the accretion doctrine and adopted, in a cryptic opinion, a distinction between natural and man-made accumulations to riparian land. Portions of the lands exposed by the dredging operations, including the lands involved in *Bonelli*, originally had been dry lands which were then submerged by erosion. The court also declined to apply the doctrine of reemergence[5] to such re-exposed lands. The Arizona court held that title to such surfaced land vests not in the adjacent riparian owner, as the accretion doctrine would require for natural accretions,[6] but in the state, which owns the beds of navigable rivers to the ordinary high water mark.[7]

A supplemental opinion denied rehearing and purported to clarify the definition of the high water mark.[8] In holding that the high water mark to which state ownership extends was fixed by the natural state of the river as it existed in 1938, the court ignored a virtually unanimous body of authority to the contrary,[9] misapplied a federal statute,[10] and rejected a federal decision directly on point dealing with federal lands in Arizona riparian to the same river.[11] The year 1938 was chosen because after that date the operation of Hoover Dam artificially affected the rate of flow of the Colorado River. The court reasoned that since the state at that time owned the river bed up to the then high water mark, artificial alterations in the river by the federal government could not operate to divest the state's title to these lands.

The following discussion will analyze *Bonelli* and its implications. In order to facilitate a full understanding of the case and to evaluate the court's treatment of the problems, it is first necessary to explore in depth the origins of and reasons for the principle that the state holds title to the beds of navigable rivers, the doctrines of accre-

3. Letter from Andrew L. Bettwy, Arizona State Land Commissioner, to *Arizona Law Review*, Dec. 8, 1971, on file in its offices.
4. 107 Ariz. 465, 489 P.2d 699 (1971), *rehearing denied & opinion clarified*, 108 Ariz. —, 495 P.2d 1312 (1972), *rev'g* 11 Ariz. App. 412, 464 P.2d 999 (1970).
5. See text accompanying notes 55-61 *infra*.
6. See text accompanying notes 37-40 *infra*.
7. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).
8. State v. Bonelli Cattle Co., 108 Ariz. —, 495 P.2d 1312 (1972).
9. See text & notes 62-67 *infra*.
10. 43 U.S.C. §§ 1301-1343 (1970) (Submerged Lands Act). See text accompanying notes 32-36, 105-110 *infra*.
11. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967).

tion, avulsion and re-emergence, and recent extensions of the doctrine of accretion to artificial additions to riparian land. Following analysis of the case, an examination will be made of the impact of *Bonelli* on the existence of vestigial riparian rights in Arizona. Finally, we will investigate some problems of federal jurisdiction inherent in the *Bonelli* situation, which may arise when the river is dredged adjacent to some of the vast stretches of federal and Indian lands that lie within the state and abutt the river,[12] and in the application of the state definition of the high water mark to such lands.

The Common Law: Title to Beds of Navigable Waterways, Accretions and Relictions

Ownership of Beds of Navigable Waterways

Although navigable waterways and the lands submerged beneath them have been the subject of much legal literature,[13] it will be helpful for later discussion to review the basic principles regarding this confusing area of the common law. Aside from rights to the use of water, two elementary interests exist in a navigable waterway: the proprietary interest in the submerged lands, and the sovereign interest in guaranteeing the public right of navigation. The former is said to be burdened by a servitude in favor of the latter under both English and American law.[14]

By the English common law, the situs of the title to the beds of navigable waterways is unrelated to the protection of navigation. The *jus publicum*,[15] a characterization of the public right to navigate and pursue commerce over the water highway, exists over all waterways navigable in fact, whether the beds are held by a private person or by the crown.[16] Because of a complicated historical background, however, a distinction developed between tidal and nontidal waterways when a question as to ownership of the bed of a particular waterway arose. Under this rule the beds of nontidal waterways are presumed to have been conveyed to the adjacent riparians, while the beds of tidal waters are presumed to be vested in the crown. This distinction was based not on the principle that title to beds of naviga-

12. Arizona Department of Planning & Development, U.S. Bureau of Land Ownership in Arizona (U.S. Geol. Surv. map 1971).

13. *See* 1 H. Farnham, Waters and Water Rights § 36, at 165-175 (1904); Fraser, *Title to Soil Under Public Waters—A Question of Fact*, 2 Minn. L. Rev. 313 (1918); 1 Waters and Water Rights §§ 35-44, at 179-279 (R. Clark ed. 1967).

14. *See* Fraser, *supra* note 13. *See also* S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, 77-81 (1953).

15. *Id.*

16. *Id. See also* Reece v. Miller, 51 L.J.R. 64 (Magis. Cas. 1882).

ble waterways should be in the crown in order to protect navigation, but upon historical considerations peculiar to England and unrelated to the protection of navigation.[17]

Although utilizing the relatively simple English scheme as a foundation, the United States developed a more complicated system of public and private rights in navigable waters. The Supreme Court of the United States rejected the English distinction between tidal and nontidal waters for situs of title purposes, reasoning that the title to lands submerged beneath all navigable waters should be held by the sovereign in order to protect navigation.[18] This holding and other decisions effected a dedication of the beds of all navigable waterways held by the state to public use.[19] Under this theory, each of the original thirteen colonies had succeeded to the proprietary interest in the beds beneath their navigable waters, tidal and nontidal, formerly held by the English Crown. Upon ratification of the Constitution, however, the new states, while retaining the proprietary interest in the beds, surrendered the dominant sovereign interest in the protection, control, and improvement of navigation to the federal government.[20]

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17. It has been demonstrated that the English rule as to ownership of the beds beneath nontidal waters is a presumption which grew out of English history. Fraser, *supra* note 13. Fraser's thesis is that the primitive peoples landing on the shores of England seized whatever land was of value and that presumably such beds were included. Later, during the Anglo-Saxon and Norman periods, grants of the upland from the sovereign expressly included the bed of the adjacent stream. His discussion concludes by noting that the United States had no such history, and argues, therefore, that no such presumption should be indulged in this country. *Id.*

18. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876); *cf.* Donnelly v. United States 228 U.S. 243 (1913). *See also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); Shively v. Bowlby, 152 U.S. 1, 49 (1894).

19. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). Professor Sax explores the question of whether a state may alienate the title to public trust lands, such as a portion of the bed of a navigable waterway, or otherwise change the use to which trust lands are dedicated. On the one hand, if the trusteeship of lands held for the public puts such land wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right would be quite an extraordinary one. On the other hand, if land held in trust for the public by the state may be transferred to private use through the exercise of the police power, then the trust imposes no restraint on government beyond that which is implicit in the judicial review of any state action. Professor Sax concludes that the duties imposed on the state lie somewhere between these two extremes. Judicial scrutiny of transactions involving lands held in trust for the public, such as the bed of a navigable watercourse, may be the only efficient means to enforce the state's duty since many administrative and even legislative authorizations of transfers of such land to private interest are not usually subject to public scrutiny. *See* Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962). *Contra*, Texas Oyster Growers Ass'n v. Odom, 385 S.W.2d 899 (Tex. Ct. Civ. App. 1965). *See also* 1 H. FARNHAM, *supra* note 13, § 36a, at 172-75.

Assuming the finality of the *Bonelli* decision, the land claimed by Arizona may be subject to the public trust doctrine and require judicial surveillance of the use to which such land is put. It is arguable that the subject land and other lands similarly obtained must be put to a use which corresponds to the trusteeship, namely promotion of navigation, fishing, and recreation. See text accompanying note 134 *infra*.

20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871); First Iowa Hydro-Elec. Co-op. v. Federal Power Comm'n, 328 U.S. 152 (1946); U.S. CONST. art. I, § 8. *See also* Arizona v. California, 283 U.S. 423 (1931).

The states may exercise sovereign control over their navigable waters only where not inconsistent with the federal servitude. The American *jus publicum*, therefore, is protected both by the federal and state navigational servitudes no matter who holds title to the bed.[21]

As new states were forged out of the federal territories after the formation of the Union, title to the lands beneath navigable waters in those areas passed from the federal government to the respective states under the equal footing doctrine.[22] Since the original states hold title to the beds of their navigable waters, the same situation must obtain in the new states, otherwise their footing would not be equal. In like manner, the new states were also granted sovereign power over their navigable waters subject to the dominant federal control.

The opportunity thus existed for the states to adopt a presumption that title to the beds of navigable waterways, tidal as well as nontidal, remained in the state unless an express grant to a private party could be shown.[23] Many American jurisdictions, however, chose the view that the English presumption as to nontidal beds was to be applied as a rule of law or as a rule of construction of grants.[24] The rule in these states is that a grant of land bounded by nontidal water—even where the body is navigable—includes the bed to the middle thread.[25] The Supreme Court of the United States has assented to this view, saying that it is for the states to determine whether to surrender their rights to the riparian owners on nontidal navigable waterways.[26] In the absence of such an election by the state, the presumption arises that it retains title to the beds of all navigable waterways unless an express conveyance is shown.

The problem, then, is what constitutes "navigable" water such that the presumption attaches to the bed. There are three definitions of navigability in the United States, depending upon the situation to which the term is applied. The first, which is beyond the scope of this discussion, is a very broad definition[27] applied to determine the

21. *See* Fraser, *supra* note 13.
22. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222-23, 228-30 (1845) (Alabama became titleholder of lands submerged beneath navigable waters located therein upon statehood, and, therefore, federal grant after statehood of reclaimed lands was of no effect).
23. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876). *See also* United States v. Oregon, 295 U.S. 1, 14 (1935).
24. *See* note 17 *supra*.
25. Archer v. Greenville Sand & Gravel Co., 233 U.S. 60 (1914) (applying Mississippi law); Buttenuth v. St. Louis Bridge Co., 123 Ill. 535, 537, 17 N.E. 439, 445 (1888) (dictum); Strange v. Spaulding, 17 Ky. L. Rptr. 305, 29 S.W. 137 (Ky. App. 1895); Krumweide v. Rose, 177 Neb. 570, 129 N.W.2d 491(1964); Mariner v. Shulte, 13 Wis. 775 (1861).
26. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876).
27. *E.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

reach of the commerce clause and federal power over waters.[28] The second is used to determine the existence or nonexistence of a public right of use analogous to the *jus publicum*. For example, suppose *X* owns land through which a stream runs. *X* also owns the bed. The stream at places is only a few inches deep. May *Y* canoe over *X*'s stream freely or would *Y* be a trespasser? A majority of jurisdictions hold that *Y* has the right of passage.[29]

The third and narrowest definition of navigability, the one which has most relevance to this analysis, is applied to determine whether the state presumptively holds title to the bed of the watercourse. The presumption attaches if the body of water in question was being used as a highway at or around the time of the admission of the particular state to the Union.[30] It is the bed of this type of navigable waterway which is presumptively held by the state. Arizona, for example, was admitted to the Union in 1912. Around that time the Colorado River was being used as a highway by rivercraft from Yuma on the Mexican border to just below the present site of Hoover Dam. The bed of this stretch of the river, therefore, is held by the state in trust for its people in the absence of the showing of an express grant of a portion of the bed.[31]

The Effect of the Submerged Lands Act

In order to clear up the controversy surrounding conflicting state and federal claim of ownership of the coastal tidelands, Congress passed the Submerged Lands Act in 1953.[32] The Act amounted to

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28. *See* materials cited at note 20 *supra*.

29. *E.g.*, People v. Mack, Civil No. 12936 (Cal. App., Sept. 15, 1971), 3 BNA ENV. REP. CAS. 1391 (1971); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); *cf.* State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). *See also* Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952). *But see* Hartman v. Tresise, 36 Colo. 146, 84 P.2d 685 (1905).

30. Utah v. United States, 403 U.S. 9, 11 (1971) (the waterway need not have been used for *commercial gain* under the test); *see* Teclaff & Teclaff, *Saving the Land-Water Edge From Recreation, For Recreation*, 14 ARIZ. L. REV. 39, 43-48 (1972). *Id.*

31. Arizona v. California, 283 U.S. 423, 453 (1931).

32. 43 U.S.C. §§ 1301-1343 (1970).

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable water within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease and develop, and use the said lands and natural resources . . . are, subject to the provisions hereof, recognized, confirmed, established and vested in . . . the respective States . . . .
>
> . . . .
>
> (d) Nothing in this chapter shall affect the use, development, improvement or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any of the rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide flood control, or the production of power.

Id. § 1311.

a federal quit-claim of all lands submerged beneath navigable waters within state boundaries. This included both inland waters and coastal waters within the seaward boundaries of the states. It renounced federal claims of ownership of, *inter alia*,

> all lands . . . covered by non-tidal waters that were navigable under the laws of the United States at the time such state became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .[33] and] all filled in, made or reclaimed lands which formerly were lands beneath navigable waters, as herein above defined . . . .[34]

The Act expressly declares that it is to have no effect on private claims to such lands based upon the laws of the United States.[35] It merely confirmed the existing case law holding that, as between the state and federal governments, the title to the beds of nontidal navigable waters is *not* in the federal government. This leaves the states the presumption that, as between the state and a private party, the former holds title.[36]

The Act also implicitly confirms existing case law with respect to claims to intervening accumulation to riparian land based upon the accretion doctrine since the state presumptively holds title to beds "as heretofore or hereafter modified by accretion, erosion, and reliction." Thus, under the Act as well as under accretion law, the state's title follows the navigable water and is not a fixed parcel of land.

Doctrines of Accretion, Avulsion and Reemergence

1. *Accretion.* Accretion is the gradual and imperceptible accumulation of land by natural causes out of the sea or other body of water.[37] Accreted land is of two kinds, one by *alluvion* and one by *dereliction*. Alluvion is land added by the deposition of silt and debris out of the water.[38] Derelicted or relicted land is land added by the recession of the water leaving a portion of the bed dry.[39] Both

33. *Id.* § 1301(a)(1).
34. *Id.* § 1301(a)(3).
35. *Id.* § 1315.
36. *See* S. REP. No. 133, 83d Cong., 1st Sess., pt. 1, at 6-8, 65, 77-81 (1953). "The purpose of this legislation is to write the law for the future as the Supreme Court [of the United States] believed it to be in the past—that the States . . . own and have proprietary use of all lands under navigable waters within their territorial jurisdiction . . . subject only to the governmental powers delegated to the United States by the Constitution." *Id.* at 8.
37. Nebraska v. Iowa, 143 U.S. 359 (1892).
38. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967).
39. Fontenelle v. Omaha Tribe of Nebraska, 298 F. Supp. 855 (D. Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970).

are governed by the same principles:[40] title to accreted land is awarded to the upland owner irrespective of who owns the bed.

The doctrine of accretion is based on several rationales. One derives from the Roman theory of accession—where a cow produces offspring or a tree produces fruit, the owner of the cow or the tree becomes the owner of the calf or the apple.[41] So the owner of riparian land owns accreted lands. Another rationale given is that where a body of water is a boundary between landowners or political entities, that body should remain the boundary.[42] Thus the legal boundary moves with gradual changes in the location of the water. The middle thread of the Colorado River, for example, is the boundary between California and Arizona. In some areas the action of the water erodes the west bank while depositing alluvion on the east bank, causing the river channel to move gradually westward. The boundary between the two states follows the movement of the channel. Where the shoreline is the boundary between the upland and the state-owned bed, accretion or erosion can cause the upland to gain or lose ground since the legal boundary follows the shoreline.

A third rationale is that where land is gained from a body of water by "little . . . and imperceptible degrees, it shall go to the owner of the land adjoining [for] *de minimis non curat lex*."[43] This magical incantation, "the law does not care for trifling matters," appears to have been an addition by English courts adopting the accretion doctrine. The adoption of the de minimis concept set the stage for a legal distinction between gradual changes and sudden changes

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40. *Id.* at 858.

41. R. SOHM, THE INSTITUTES 323 (J. Ledlie transl. 3d ed. 1907):

> Accession is the name given to a thing which, having previously existed as an independent thing, has passed into an integral part of another thing. . . . A thing which becomes an accession ceases to have an independent existence. . . . As soon . . . as a thing becomes an accession, all former right of ownership in it are destroyed, because its existence as an independent thing is destroyed. . . .
>
> . . . [Examples of accession:] 'alluvio,' . . . the accretion by which a public river, in an imperceptible manner, enlarges a plot of land; 'avulsio,' . . . the accretion by which a public river enlarges a plot of land in a perceptible manner [inures to the riparian]; . . . 'alveus derelictus,' . . . the derelict bed of a public river which has changed its channel (the bed, which thus becomes free, becomes the property of the riparian owners on each side as an accession, the middle bed forming the boundary); 'insula nata,' . . . a term applied when part of a public river becomes free, the rule in such a case being the same as with an alveus derelictus.

See also Manry v. Robinson, 122 Tex. 213, 56 S.W.2d 435 (1932); R. LEE, THE ELEMENTS OF ROMAN LAW 132 (4th ed. 1956).

42. *E.g.*, Anderson-Tully Co. v. Tingle, 166 F.2d 224, 227-28 (5th Cir. 1948), *cert. denied*, 335 U.S. 816 (1948); Mecca Land & Exploration Co. v. Schlecht, 4 F.2d 256 (D. Ariz. 1925); Mood v. Banchero, 67 Wash. 2d 835, 410 P.2d 776 (1966). *See* Annot., 41 A.L.R. 382 (1926).

43. 2 W. BLACKSTONE, COMMENTARIES *262; *see* BLACK'S LAW DICTIONARY 482 (4th ed. 1951).

along waterways.[44] No such distinction was drawn in Roman law.[45]

Another reason given for the accretion doctrine is what has been called the "productivity theory,"[46] which holds that the law as a matter of policy should favor productive uses of lands. Since the riparian owner is in a better position than the state or a stranger to utilize accreted land, the courts declare title to be in him. Giving the upland owner accreted land as it is formed allows him to put it to immediate use instead of having title pass through the sovereign.[47]

A fifth justification is compensation. Since the riparian owner is subject to losing land by *erosion*, he ought to benefit from any addition.[48] Nor should he be cut off from the stream. Therefore, the final and perhaps most important reason for the doctrine is to preserve the riparian character of the upland. The quality of being riparian, especially to navigable water, is a valuable asset and is part and parcel of the ownership of such land.[49] By requiring that the

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44. 2 W. BLACKSTONE, COMMENTARIES *262.

45. See note 41 *supra*. *See also* State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 703 (Lockwood, J., dissenting). The de minimus theory deals not with de minimus *quantities* of land but with de minimus *increments* to land such that the increments are gradual and imperceptible. The test was stated by the Supreme Court of the United States: "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874). Most cases dealing with accreted land involve more than de minimus amounts of land. For example, the swift and wild meandering of the Missouri River has caused large areas of accreted land in weeks or months. *See* Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. REV. 429 (1967).

46. *See* Beck, *supra* note 45. *Cf.* Jefferis v. Eastern Omaha Land Co., 134 U.S. 178, 191 (1890); Banks v. Ogden, 69 U.S. (2 Wall.) 57, 67 (1864); Adams v. Frothingham, 3 Mass. 352 (1807); Gifford v. Yarborough, 130 Eng. Rep. 1023, 1024 (C.P. 1828).

47. *Cf.* Gifford v. Yarborough, 130 Eng. Rep. 1023, 1024 (C.P. 1828). *See also* Beck, *supra* note 45.

48. *E.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874); United States v. 11,993.32 Acres of Land, 116 F. Supp. 671, 678 (D.N.D. 1953); Hall v. Brannan Sand & Gravel Co., 158 Colo. 201, 204, 405 P.2d 749, 750 (1965); Burke v. Commonwealth, 283 Mass. 63, 186 N.E. 277 (1933).

49. *E.g.*, Hughes v. Washington, 389 U.S. 290, 294 (1967); Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912); *see* Merryman v. Goins, 190 Okla. 442, 444, 124 P.2d 729, 731 (1942) (adjoining riparian owners to maintain same proportion of riparian land in accreted lands as they had in pre-accretion situation). The Minnesota court has expressed this view of the accretion doctrine:

> But it seems to us that the [accretion] rule rests upon a much broader principle, and has a much more important purpose in view, *viz.* to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principle value of land—of *access to the water*.
>
> The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the waterline had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. [Emphasis Added.]

Lamprey v. State, 52 Minn. 181, 197, 53 N.W. 1139, 1142 (1893). There appears to be no logical reason for reaching a contrary result where an intervening third party causes changes in the river. The riparian owner is subject to the whim of the federal government in the exercise of the navigation servitude as much as he is subject to the wanderings of the river. *See* materials cited at note 77 *infra*.

upland owner suffer the burden of erosion and by giving him the benefit of accretion, riparianness is maintained. All of the rationales are somewhat interrelated, and many of the earlier opinions contain references to most if not all of them.[50]

2. *Avulsion.* Whereas accretion is the gradual and imperceptible[51] addition of land, avulsion is the "rapid, easily perceived, and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs."[52] In contrast to erosion or accretion, avulsive shifts do not result in changes in legal boundaries. The avulsion doctrine stabilizes the location of titles even though the river or ocean may swallow some lands and resurface others.[53] For instance, *A* and *B* are riparian owners on opposite sides of a river. Due to a flood the river takes a new course running through the middle of *A*'s parcel. The old bed which is now dry remains the boundary between parcel *A* and parcel *B* even though *B* is no longer riparian to the new channel. In other words, the courts have chosen the policy that where there is a fortuitous *sudden* change in the location of the river bed, the riparian right of one is extinguished by the fee ownership of land by another. If the state owns the bed of the river in the example, the state retains title to the old bed. *A* holds title to the new bed since the river is now running over his land. If the river were the

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50. *See, e.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Adams v. Frothingham, 3 Mass. 352 (1807); State *ex rel.* McKay v. Sause, 217 Ore. 52, 342 P.2d 803 (1959).

51. *See* note 45 *supra.*

52. Bauman v. Choctaw-Chickasaw Nations, 333 F.2d 785, 789 (10th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965).

53. *Id.* *See* Nebraska v. Iowa, 143 U.S. 965 (1965).

Blackstone said that the doctrine of avulsion would also apply if there were a sudden loss of land by a riparian owner and a sudden increment of land across the river or downstream: "he shall have what the river has left in any other place, as a recompense for this sudden loss." 2 W. BLACKSTONE, COMMENTARIES *262, 263. It has been widely held, however, that where the loss of one's land is visible and sudden, unless there is a deposit of the identical land somewhere else (which is physically impossible since land loses its identity in the collodial suspension of the river) the land added downstream or across the river is still presumed to be accreted. In Nebraska v. Iowa, 143 U.S. 359 (1892), for example, the court noted that large parts of the river bank involved fell into the river, disintegrated, and were deposited downstream, and stated:

> But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law. . . .
>
> . . . There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and the deposit of the same on the other.

Id. at 367, 369. *See also*, Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890).

Another example of the operation of the avulsion doctrine is where *C* owns land with an ocean-front. While the shore is above sea-level, the land behind the shore is dry but just below sea-level. A storm causes the ocean to wash away the shore and submerges *C*'s land. *C* does not lose title.

least bit navigable, however, *A*'s title would be burdened with the navigation easement.

New land abutting a waterway is presumed to be accretive rather than avulsive.[54] Since an avulsive change would certainly be noticed at or shortly after the time of the sudden natural phenomenon, witnesses would be available to testify to the occurrence. Such would not be the case where the gradual accretive process has occurred. Thus, in the absence of such proof, a change is presumed to be accretive.

3. *Reemergence.* Where a landowner loses acreage to a navigable river by erosion, title to this acreage is transferred by law from him to the state or owner of the bed. If the river were to move in the other direction and replace that same acreage with accreted land, the landowner would obtain title by the doctrine of accretion. If the river moved by an avulsive shift rather than by slow and imperceptible accretive movements, some jurisdictions recognize the "doctrine of reemergence," and hold that the title to such land re-vests in its former owner.[55] In *Mulry v. Norton*,[56] for example, plaintiffs had lost littoral land to the sea. Later, land began accreting to defendants' adjacent land as well as to plaintiffs' land. The Massachusetts court declared that title to the lost land re-vested in the plaintiffs:

> It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or suffices to enable another to acquire it. . . . Land lost by submergence may be gained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have extended thereover, the people, by virtue of their sovereignty, having authority over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of permanent acquisition by the sea. It is equally true, however, that *when the water disappears from the land*, either by its gradual retirement therefrom or the elevation of the land *by avulsion* or accretion, *or even the exclusion of the water by artificial means*, that its proprietorship returns

54. *E.g.*, Hall v. Brannan Sand & Gravel Co., 158 Colo. 201, 214, 405 P.2d 749, 750 (1965).

55. Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956); Klais v. Danowski, 373 Mich. 262, 129 N.W.2d 414 (1964); Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581 (1885); Hunzicker v. Kleeden, 161 Okla. 102, 17 P.2d 384 (1932). *See also* Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966) (recognizing rule); *In re* City of Buffalo, 206 N.Y. 319, 99 N.E. 850 (1912) (recognizing rule); Annot., 41 A.L.R. 382 (1926).

56. 100 N.Y. 424, 3 N.E. 581 (1885).

> to the original riparian owners. . . . Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship . . . .[57] [Emphasis added.]

This rationale has been followed in other jurisdictions[58] and reason seems to commend it. Since the advance of the water divested the title of the upland owner to the state in order to guarantee full public enjoyment of the watercourse,[59] when the water recedes from the land, there is no longer a public benefit to be protected. Consequently, the state has no need for the title. That the cause of the recession of the waters is "artificial" or man-made should be of no effect. Title should re-vest in the former owner unless the land was created as part of a navigational project of which it is a necessary and integral part,[60] or unless the artificial addition is caused by the upland owner without government approval.[61]

Accretions Caused in Part or in Whole by the Works of Man

There are basically three types of "unnatural" land accumulations along a waterway. The first is distinguishable from natural accretion only because man has interfered with the currents of the waterway, thus causing an accretion where otherwise there would be none. For example, where a state builds a dike and a city dumps debris into a river to protect a harbor,[62] or the federal government builds a dam,[63] or a third party builds a revetment to protect a right-of-way,[64] these actions affect the currents and the rate of flow of the water and cause *"artificial accretions."* The accretions are in fact natural; only the cause—an upstream dam, for example—is artificial. The general rule is that accretions of this kind inure to the upland owner.[65] The rea-

57. *Id.* at 434, 3 N.E. at 584-85.
58. Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956) (applying Oklahoma law); Hunzicker v. Kleeden, 161 Okla. 102, 17 P.2d 384 (1932).
59. See text & note 18 *supra*. *Cf.* cases cited in note 29 *supra*.
60. *See* Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).
61. *See* Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969).
62. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).
63. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). *See also* Solomon v. Sioux City, 243 Iowa 634, 51 N.W. 2d 472 (1952). In *Solomon* the federal government built a series of dikes and jetties which caused an artificial reliction of the river and slowed the current. Within 2 to 3 years the upland had been extended by over 300 feet of relicted and accreted land. Title was held to be in the upland owner and not in the city as grantee of the state and owner of the bed.
64. Littlefield v. Nelson, 246 F.2d 936 (10th Cir. 1957).
65. *E.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874); Abbot Kinney Co. v. City of Los Angeles, 340 P.2d 14, 19-21 (Cal. App.), *vacated*, 53 Cal. 2d 52, 346 P.2d 385 (1959); *see* Krimlofski v. Matters, 174 Neb. 774, 119 N.W.2d 501 (1963). *See also* cases cited in note 62 *supra*.

son for this rule, as stated by the United States Supreme Court, is that "the proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial."[66] The vast majority of courts place no reliance on the distinction between artificial and natural causes which affect the flow of the water, looking to the speed of change and not the source.[67]

A second type of unnatural addition to riparian land may occur where a human agency has caused land to appear out of the water by what may be termed *direct action*. Thus by filling or by partial relocation of the waters at the point of the disputed parcel, otherwise natural accretions attach to that land. The human agency has therefore caused a natural accretion by means both artificial and direct, a *point-induced accretion*. For instance, riparian owners have been held to acquire title to land where garbage deposits next to the riparian by third persons accelerated accretion to their riparian land.[68] In another situation the Corps of Engineers rechanneled the Mississippi river causing most of the river water to flow through the new channel, although there was still an intermittent flow in the old channel.[69] A reliction occurred in the old channel because of the diversion of most of the water, and alluvion attached to this land because of the intermittently sluggish flow. Plaintiff was a stakeholder seeking a declaration as to whom it should pay royalties for oil well production on this land. The Louisiana court held that the riparian owner, not the state as owner of the bed, held title to the subject land. The court reasoned that there is no distinction between accreted lands caused "primarily" or "partly" by the works of man.[70] Similar results have been reached in other jurisdictions.[71]

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66. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874).

67. *See generally* Annot., 134 A.L.R. 467 (1941). *See also* Adams v. Frothingham, 3 Mass. 352 (1807). *But see* Patton v. City of Wilmington, 169 Cal. 521, 147 P. 141 (1915).

68. Nordale v. Waxberg, 84 F. Supp. 1004, 1005 (D. Alas. 1949), *aff'd*, 182 F.2d 1022 (9th Cir. 1950). On the other hand, the upland owner was denied title to accreted land where he dumped oyster shells into the water fronting his land causing an increase in the rate of accretion. Lorino v. Crawford Packing Co., 142 Tex. 51, 175 S.W.2d 410 (1943). *See also* City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929) (accretions caused partly by dike and partly by portions of the dike sliding into water providing abundance of alluvial material in local waters held vested in the grantee of the state as the owner of the tideland and not in the upland owner); Carpenter v. City of Santa Monica, 63 Cal. App. 2d 772, 789, 147 P.2d 964, 972 (1944) (construction of dike and dumping of materials into waters caused accretions which remained vested in the state's grantee and did not vest in the upland owner); Los Angeles Athletic Club v. City of Santa Monica, 63 Cal. App. 2d 795, 147 P.2d 976 (1944).

69. Esso Standard Oil Co. v. Jones, 233 La. 915, 98 So. 2d 236 (1957), *aff'd on rehearing*, 233 La. 940, 98 So. 2d 244 (1957).

70. *Id.* at 934, 98 So. 2d at 241.

71. *E.g.*, Sieck v. Godsey, 254 Iowa 624, 118 N.W.2d 555 (1962); *see* Krumweide v. Rose, 177 Neb. 570, 129 N.W.2d 491 (1964). *But see* cases cited in note 68 *supra*.

The third category of unnatural additions to riparian land, which probably includes the *Bonelli* dredging situation,[72] embraces land created at the waters' edge by direct filling or dredging, rather than by a man-induced accretive process—"artificial accretion" or "point-induced accretion." This *reclamation* is neither alluvion nor dereliction since it is created by the action of man rather than nature, and since its formation is neither gradual nor imperceptible. Ordinarily, a riparian or littoral owner cannot acquire title to land which he created by filling in the publicly owned bed of a navigable water-course.[73] Where the reclamation of land by filling or dredging of the adjacent submerged land is expressly permitted by statute, however, it is generally held that, so long as the public rights with respect to navigation and commerce are not substantially impaired, filled land created by a riparian proprietor belongs to him as part of the upland.[74]

Where the state or its grantee as the owner of the bed has filled in the submerged land, it is generally held that the state retains title to such reclaimed land even though it may eliminate the riparian character of the upland.[75] In some jurisdictions, however, it is required that the reclaimed land be an integral part of a navigational project for this result to obtain.[76] This requirement—referred to as the navigational purpose rule—is preferable since littoral or riparian rights are already subject to being extinguished without compensation in numerous other ways.[77] The rule is illustrated by *Michaelson v.*

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72. *Compare* State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953), *with* State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971).

73. *E.g.*, Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); McDowell v. Trustees of Int'l Imp. Fund, 90 So. 2d 715 (Fla. 1956); Carli v. Stillwater Street R. Transfer Co., 28 Minn. 373, 10 N.W. 205 (1881); State *ex rel.* McKay v. Sause, 217 Ore. 52, 89-90, 342 P.2d 803, 821-22 (1959) (dictum).

74. *E.g.*, Holland v. Ft. Pierce Financing & Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946); Miller v. Mendenhall, 43 Minn. 95, 44 N.W. 1141 (1890) (statute fixing harbor line); Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) (permit); Gough v. Bell, 22 N.J.L. 441 (1850), *aff'd on rehearing*, 23 N.J.L. 624 (1852) (local common law).

75. *E.g.*, United States v. California, 381 U.S. 139, 177 (1965).

76. Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).

77. *See* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963); Comment, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969); Note, *The Public Right of Navigation and the Rule of No Compensation*, 44 NOTRE DAME LAW. 236 (1968). *But see* United States v. 8,968.06 Acres of Land, 326 F. Supp. 546 (S.D. Tex. 1971), *rev'g* 318 F. Supp. 698 (S.D. Tex. 1970); Pub. L. No. 91-611, § 111, 84 Stat. 1818 (1971) (River and Harbor Act of 1970). The Act is a legislative reversal of United States v. Rands, 389 U.S. 121 (1967). *Rands* held that riparian owners need not be compensated for the value of their land due to its proximity to water where the parcel was being condemned. The Act provides that, where the federal government condemns real property

> in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken . . . above the normal high water mark of the navigable waters of the United States shall be the fair market value . . . based upon all the uses to which such real property may be put, including its

Silver Beach Improvement Association[77a] in which the Massachusetts department of public works authorized creation of a beach fronting on plaintiff's littoral land. The beach was created by dredging and pumping sand from the floor of the harbor in connection with a harbor improvement project. Plaintiff sought to enjoin defendant's use of the beach for public purposes and claimed title to the beach. An injunction was granted and title to the land surfaced by the operation was held to be in the plaintiff. The court reasoned that although the dredging and resultant beach were incident to a navigational project authorized by the legislature and financed by the public, the placing of the dredged material in front of *this particular upland* had no such navigational purpose. The dredged material could have been placed elsewhere. The court stated that to create a public playground as was done here, the state must resort to the welfare power and to the use of eminent domain. Because there was no substantial connection between the reclamation of the land interposed between the upland and the ocean, and the improvement of navigation, the littoral rights of the upland could not be taken without compensation. Other courts have reached the same result on the grounds that the upland owner had taken no part in creating the addition.[78]

A dredging case decided by the Alabama court is exemplary of third-party reclamation by dredging in the main channel and is remarkably similar to the *Bonelli* situation.[79] In order to gain access to the dock of an ammunition dump, the United States Government dredged a channel in Mobile Bay and cast the dredged material along the shoreline, including the portion owned by the plaintiff. This strip of dredged land cut off plaintiff's access to the bay. He received no compensation and could not have successfully demanded it of the federal government.[80] The Alabama court denied the state's claim to the new land, holding that the title was in the plaintiff as the upland owner. The court noted that although the federal government had the

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highest and best use, *any of which may be dependent upon access to or utilization of such navigable waters.* In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized . . . .

Pub. L. No. 91-611, § 111, 84 Stat. 1818 (1971). [Emphasis added.] The definition of "navigable" waters used in the Act is presumably the commerce clause definition. *See* notes 27-31 and accompanying text *supra.* What effect the Act will have on state condemnation proceedings remains to be seen. Absent a direct taking of real property, however, the federal and state navigational servitudes may burden the riparian with non-compensable injury.

77a. 342 Mass. 251, 173 N.E.2d 273 (1961).

78. Harrison County v. Guice, 244 Miss. 95, 140 So. 2d 838 (1962). *See* text & note 73 *supra.*

79. Sate v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).

80. U.S. CONST. art. I, § 8. *See* materials cited note 77 *supra; cf.* United States v. Twin City Power Co., 350 U.S. 222 (1956).

implied sanction of the state as owner of the bed to dredge the channel,[81] that sanction was for the improvement of navigation and commerce, and not for the purpose of raising the bed above sea level. Noting the actual physical deposit of the dredged material in front of the upland, the court stated:

> It is obvious that we do not have in the case at bar an accretion by any slow or imperceptible processes. It has been suggested that the speeded up, artificial accretion, such as we have in the present case could well be called 'streamlined accretion' or perhaps a reclamation.
>
> . . . [W]here there is what we have termed a streamlined accretion . . . title to such made-land is conferred upon the upland owner, subject only to the paramount rights of the United States and the State in aid of navigation. We understand that the title to the bed or bottom beneath navigable waters is in the state, *but this is a title to the bed as a bed.* . . . The state still owns the title to the bed beneath navigable water, but the made-land being added to the property of the riparin or littoral owner becomes his property.[82] [Emphasis added.]

Thus the navigational purpose rule was reaffirmed. The new land had no substantial connection with the navigational project since navigation was not aided by placing the dredged material in front of this particular upland, and the new land was not needed as a part of the project.

ANALYSIS OF BONELLI

The River's Changing Path

Because the Colorado River was navigable in fact when the United States acquired sovereignty over it, its bed was not ordinary federal land but was held in trust for the people of the states which would be formed bordering the river.[83] Bonelli's predecessor in interest obtained a federal patent for the east one-half of a section of land[84] in

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81. 259 Ala. at 183, 66 So. 2d at 145.

82. *Id.* *See also* Adams v. Roberson, 97 Kan. 198, 155 P. 22 (1916); *cf.* Gillihan v. Cieloha, 74 Ore. 462, 145 P. 1061 (1915) (in absence of claim by state, upcast bed of navigable waterway inures to upland). *See also* Burns v. Forbes, 412 F.2d 997 (3d Cir. 1969) (holding that the doctrine of accretion does not extend to lands dredged by the upland owner without permission of governmental owner of bed; and indicating by dictum that the doctrine of accretion extends to third party's accretions artificially created by dredging and title to such land would inure to the upland).

83. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *But see* United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971) (federal patent of lands submerged beneath navigable waters issued to railroad 50 years before statehood was a valid conveyance).

84. E ½, Sec. 3, T 19 N, R 22 W, G&SRM. This parcel is located just north of the Fort Mohave Indian Reservation where the States of Arizona, California and Nevada converge.

1910, two years before Arizona's statehood. A United States Geological Survey Map dated 1902-03 showed the Colorado River approximately one-quarter of a mile west of this section. The river, however, moved steadily eastward from that time and it was not known at the trial whether the subject parcel was riparian at the time of the grant. If in fact the parcel was riparian at the time of the conveyance, the presumption would be that the federal grant of the upland did not include a grant of the adjoining river bed unless expressly made.[85] If such a grant could have been shown, the *Bonelli* situation would never have arisen because the upland and the bed would have been held under one title and there would have been no boundary present to move with the later encroachment of the river. Since there was no showing of such a grant, the federal government retained title to the adjacent bed.

Upon admission to the Union in 1912, the State of Arizona succeeded the federal government to the title of the bed of the Colorado River and held it in trust for the people of the state. The area in controversy in *Bonelli*, however, was not at that time part of that bed. It was then dry land owned by Bonelli's predecessor. It was generally agreed at trial that between 1903 and 1938 the river in this area gradually eroded its east bank and deposited alluvion on its west bank, resulting in the submergence by erosion of the disputed acreage and leaving dry approximately 60 acres in the southeast corner of the parcel.[86] As the river crept eastward, the boundary between the upland and the state-owned bed also moved mechanically eastward with this gradual encroachment, transferring the title to lands which had become a part of the bed from the riparian to the state.[87]

The operation of Hoover Dam beginning in 1938 reduced the flow of water in the Colorado. Local currents were affected, and the river stopped its eastward encroachment in the *Bonelli* area. Damming of the river may also have prevented or inhibited a possible subsequent reversal of direction of encroachment which would have accreted land on the east bank rather than eroding it. By the great weight of authority however, the operation of the dam has no legal effect on the doctrine of accretion and the latter remains in full force.[88] While the dam, like any other man-made obstruction, may affect the

85. *See* Fraser, *supra* note 13.

86. 107 Ariz. 465, 467, 489 P.2d 699, 701 (1971).

87. Even if the title had not been so transferred and the riparian had remained the owner of the submerged land, the public right of navigation would have been guaranteed through federal or state enforcement of the *jus publicum*. *See* text & note 21 *supra*. *See also* cases cited at note 29 *supra*.

88. *E.g.*, Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); *see* cases cited in notes 62-71 and accompanying text *supra*.

flow and currents of the river, the benefit of accretion and the detriment of erosion still fall where chance would have them.

Ownership of the Resurfaced Land

In 1955 *Bonelli* acquired a deed to the subject half-section which, with the exception of the 60 acres in the southeast corner, was at that time covered by water. Since submergence by erosion of navigable water extinguishes title in the upland, the deed could not have conveyed the fee to that portion of the parcel covered by the river. The state owned it rather than the grantor. The grantor did, however, possess an interest in the lost land if the doctrine of reemergence were to be followed.[89] This interest might be labeled an "expectancy" where the title would re-vest should the land be reexposed. In describing the submerged land, the deed presumably conveyed whatever interest the grantor possessed. This, therefore, would provide the basis for a claim to the land later re-exposed in 1960.

Some 10 years after the land was re-exposed by the federal dredging project, Bonelli brought this action to quiet title.[90] The suit was successful[91] in the trial and intermediate appellate courts, but met with reversal in the Supreme Court of Arizona. The plaintiff's argument that the doctrine of reemergence should apply to the exposed land was obliquely dismissed by the court: "We believe . . . that the dredging of the river is an engineering relocation of the waters . . . by artificial means and is not a true case of withdrawal or retrogression."[92] Under the doctrine of reemergence, however, neither the rate of accumulation nor the causative force should be considered;[93] the restoration of lost land may be gradual or sudden, natural or man-induced. Since title to land lost by erosion passes to the state, ostensibly to facilitate the protection of public rights in navigable waters,[94] when the land is left dry and no longer connected with that interest,

89. *See* text & notes 55-61 *supra*.

90. The quiet title action was brought as a preliminary step in the plaintiff's plans for the development of a river resort area on the parcel. Telephone interview with Elmer C. Coker, Attorney for Plaintiff, State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), *rehearing denied, & opinion clarified*, 108 Ariz. —, 495 P.2d 1312 (April 13, 1972), *rev'g* 11 Ariz. App. 412, 464 P.2d 999 (1970), Phoenix, Ariz., Jan. 24, 1972.

91. Both the trial court and the Arizona Court of Appeals held for the plaintiff. 11 Ariz. App. 412, 464 P.2d 999 (1970).

92. 107 Ariz. at 468, 489 P.2d at 702.

93. *See* Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581 (1885); text accompanying notes 55-58 *supra*.

94. *Cf.* Barney v. City of Keokuk, 94 U.S. 324, 338 (1876):

> In order that the passage ways of commerce and navigation might be subject to public authority and control, title to land under water and to the shore below ordinary high water mark . . . [should be] vested in the [sovereign] for public use and benefit.

it should be restored to the upland no matter what the cause of resurfacing.[95]

The *Bonelli* plaintiff's second argument that the exposed land should be considered an "artificial accretion" to his upland was summarily rejected by the court, which observed that the addition of land in this case was neither gradual and imperceptible nor the result of natural causes.[96] A thorough analysis of this issue requires full consideration of both the theoretical and factual aspects of the situation presented. The dredging process undoubtedly affected the flow and currents of the river and produced three separate effects. The first two effects are closely linked. The dredging probably raised a great deal of sediment facilitating local alluvion deposition contemporaneously with the reliction of the waters caused by the deepening and narrowing of the channel. Third, spoil dredged from the river bed was deposited toward the banks of the river adding appreciably to the land accumulation. The three processes in concert thus brought about the disputed dry acreage. By the mechanics of the accretion doctrine, the alluvion deposition and reliction were presumptively gradual and imperceptible,[97] notwithstanding the human works in the river.[98] The

95. The upland owner may not, of course, reclaim any part of the bed without governmental permission.

96. 107 Ariz. at 468, 489 P.2d at 702. The cases cited by the court in support of the holding on this issue seem to have little relation to the *Bonelli* situation. Wilemon v. City & County of Dallas Levee Improvement Dist., 264 S.W.2d 543 (Tex. Civ. App. 1953), *cert. denied*, 348 U.S. 829 (1954), involved a plaintiff whose land had abutted a navigable river where the district had cut an entirely new channel away from plaintiff's land and had removed the waters completely from the old bed. Neither the question of reemergence nor of preservation of riparian access was involved and plaintiff's claim to the dried river bed was denied. Ray v. State, 153 S.W.2d 660 (Tex. Civ. App. 1941), involved the same type of total relocation of the waters of the navigable Trinity River. In that case, however, the state's title in the old bed was retained on the ground that the old bed was part of a navigation and river control project and might be needed for flood control.

State v. Aucoin, 206 La. 787, 20 So. 2d 136 (1944), is distinguishable in that the case involved the question of artificial relictions to land abutting a lake, and by Louisiana law the doctrine of accretion does not apply to lands abutting a lake. LA. CIV. CODE ANN. art. 509-10 (West 1952).

Padgett v. Central & S. Fla. Flood Control Dist., 178 So. 2d 900 (Fla. 1965), may also be distinguished from *Bonelli*. Although the Florida court declared that "[t]he doctrine of reliction . . . is applicable to additions created by recession of waters from natural causes; it does not apply to land reclaimed by drainage operations of governmental agencies," *id.* at 904, the court relied strongly on the ground that the plaintiff's predecessor's grant and plaintiff's deed contained a reservation in the state, declaring that the state could carry out such reclamation and retain title to the bed, and thus plaintiff had notice and could not complain.

97. *See* note 53 *supra*.

98. *See* text & notes 62-71 *supra*. A rather tenuous argument may be made that the accumulation of the land involved in *Bonelli* would qualify as gradual and imperceptible. If the dredging operation took place over a period of 6 months, for example, the exposure of a half-section of land would proceed at the rate of about 0.12 inches per minute. Arguably, this rate may qualify as imperceptible. The outcome, of course, should not depend on a matter as mechanical as this. *See* Beck, *supra* note 45 for a discussion of cases of natural accretions of large amounts of land which have occurred in months or even weeks. *See also* Esso Standard Oil Co. v. Jones,

load-by-load dumping of spoil dredged from the river bottom was, of course, easily perceptible, which would seem to enable the state to carry its burden of overcoming the presumption. An impasse in the application of the mechanical rules develops, however, since it is impossible to separate the spoil from the accretions and relictions over the physical area of the disputed land. No one can say with any measure of certainty that a certain cubic yard is attributable to reliction; this cubic yard to alluvion, or that to spoil.

Consideration of the theories behind the accretion doctrine supports awarding the new land to the riparian. By the theory of accession, the upland owner has a right to accreted lands similar to that of the owner of a tree to its fruit.[99] That some third party has "fertilized" the growth should be of no effect. Under the productivity concept, the upland owner is in a better position than the state to utilize the new land.[100] The compensation rationale reasons that since the upland is subject to loss by erosion, it should gain by accretion. A compensation theory might similarly be formulated for man-made or man-caused additions: since lands riparian to navigable water may suffer noncompensable losses and injuries[101] or be deprived of their riparian character altogether by federal or state exercise of the navigational servitude,[102] surfaced land should inure where it is not needed as an integral part of the navigational project.[103] The state, for instance, might show that, due to varying releases of water through Hoover Dam, the land disputed in *Bonelli* is needed to carry periodic over-flow of the river.[104] Or it might show that the land is needed for a dike or similar river-control project. Absent such a demonstration, however, the new land should vest in the upland owner to preserve his riparian status.

The riparian owner has no control over *natural* forces which might cause intervening lands between his land and the river and which, if not held by the riparian, would extinguish the riparian status of his land. The accretion doctrine guarantees maintenance of his riparian status by automatically awarding him the ownership of such intervening lands. Similarly, because of the federal and state navigational servitudes, the riparian has no control over the *governmental* forces which may cause such intervening lands. Where land cast up in the

233 La. 915, 98 So. 2d 236 (1957), *aff'd on rehearing*, 233 La. 940, 98 So. 2d 244 (1957).

99. See note 41 *supra*.

100. See text & note 42 *supra*.

101. See note 77 *supra*.

102. *Id.*

103. *See* Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).

104. *See* Ray v. State, 153 S.W.2d 660 (Tex. Civ. App. 1941). *See also* note 96 *supra*.

exercise of the servitude is not needed to further navigation, accretion theory should provide a disposition.

The High Water Mark

In clarifying the definition of "high water mark" in the supplemental opinion to *Bonelli*, the Supreme Court of Arizona held that "subsequent artificial control of the river could not deprive Arizona of property rights in the bed [of the Colorado River] which were constitutionally vested prior to the completion of the Hoover Dam in 1938" and that consequently the high water mark *as it existed in 1938* is the line of demarcation between the upland owner's property and the state-owned bed.[105] Although citing no authority in direct support of its holding, the court referred to the Submerged Lands Act[106] for the proposition that the state owns the beds beneath navigable waters to the high water mark as it existed in 1938. The Act is more logically construed, however, to support a result contrary to that reached in the *Bonelli* supplemental opinion.

The Act specifically adopts the concept of the changing river bed by declaring that the state holds title to lands submerged beneath nontidal navigable waters within their boundaries "as heretofore or hereafter modified by accretion, erosion, and reliction."[107] Presumably, when they enacted the Submerged Lands Act the members of Congress knew of the common law of accretion, including the case of *County of St. Clair v. Lovingston*,[108] decided by the Supreme Court of the United States in the 19th century. That case held that man-made obstructions and interferences in a navigable waterway have no effect on the operation of the doctrine of accretion, and that "whether the flow was affected by artificial means is immaterial" to the vesting of accretions in the riparian owner. Thus the Act may be construed simply to confirm existing case law regarding the beds of nontidal navigable waterways: the state holds the bed as a bed; the state loses title to lands made dry by accretion, while the riparian loses title to lands submerged by erosion, regardless of artificial or natural causes. Similarly, while quit-claiming federal interests in lands reclaimed from navigable waters,[109] the Act has no effect on private claims to such

105. 108 Ariz. —, —, 495 P.2d 1312, 1313-14 (1972).
106. 43 U.S.C. §§ 1301-1343 (1970).
107. *Id.* § 1301(a)(1).
108. 90 U.S. (23 Wall.) 46, 69 (1894).
109. 43 U.S.C. §§ 1301(a)(3), 1311 (1970), said to be a "saving clause providing that nothing in [the Act] shall affect such rights, if any, as may have been previously acquired under any law of the United States [in] lands subject to this resolution." S. REP. No. 133, 83d Cong., 1st Sess., pt. 1, at 13 (1953).

lands.[110] The Supreme Court of Arizona, therefore, may look to the Submerged Lands Act solely for the proposition that the state presumptively holds title to the beds of navigable waterways to the *current* high water mark. The Act leaves the individual state to decide whether reclamations are to be treated as accretions, rather than declaring that reclamations must remain in the state.

The *Bonelli* definition of the high water mark is as far-reaching as it is unique. The operation of Hoover Dam since 1938 has reduced and slowed the flow of the river. This undoubtedly facilitated alluvion deposition and reliction downstream. If the hypothesis is accepted that the width of the river has merely diminished while the middle thread of the river has remained geographically constant, the result of the holding that such accretions do not vest in the riparians is that the state owns a corridor of lands, extending from the dam to the Mexican border, intervening between the riparians and the river, thus leaving no private persons riparian to the Colorado River in Arizona. The inequity to the riparians is equally manifest as the effect on stability of title.

Alternatively, there are probably areas along the river which have been submerged by erosion since 1938. If the high water mark of 1938 is controlling, the state does not hold title to such lands—the private adjacent owner does. This, of course, is inconsistent with virtually unanimous case law.[111] It may be argued that the court has dealt with this contingency in their enigmatic statement that while 1938 was the date at which the boundary was set, "evidence of the river's condition thereafter may be illuminating."[112] If this is an attempt to provide that lands submerged since the operation of the dam still vest in the state, while at the same time denying the riparians accretions, the court is perverting the common law. There is no authority for such a position and there is certainly no reason in support of it. On the other hand, if the statement may be regarded as extraneous, there is little escape from the result that lands submerged after the beginning of operation of the dam do not vest in the state since, as the court reasons, "artificial control of the river could not divest" the upland owner of his property rights.[113]

The result of this interpretation of the court's definition of the high water mark is that the bed of the river is a mosaic, predom-

110. See text accompanying notes 32-36 *supra*. *See also* Arizona v. California, 381 U.S. 139, 177 (1965).
111. *See* text & notes 37-54 *supra*.
112. 108 Ariz. at —, 495 P.2d at 1314.
113. *Id.*

inantly state held but interspersed with privately-held parcels. Similarly, the lands abutting the river are held by the state in places where the 1938 high water mark extends higher than the current high water mark, while they are privately held in other places where the 1938 high water mark coincides with the current high water mark. This is, of course, inconsistent with the accretion doctrine's purpose of providing stability of status—the state should maintain proprietary control over the bed, while the riparian should remain riparian. The riparian should obtain the benefit of accretion and suffer the burden of erosion. In holding otherwise in the supplemental opinion, the Arizona court has misconstrued or distorted the common law, or has failed to articulate the underlying rationale for its decision.

The Effect on Riparian Rights in Arizona

The *Bonelli* decisions cast doubt upon the existence of vestigial riparian rights in Arizona. Though the riparian *usufructory* right was expressly abrogated by the state constitution and the doctrine of prior appropriation substituted in its stead,[114] both policy and legal reasons exist for confirming the retention of those riparian rights not essential to the efficient administration of the appropriation system. One such right which could easily have survived the adoption of the appropriation doctrine is the right of access to navigable waters.[115] If access is maintained, other riparian benefits such as fishery, recreation and the right of accretions should logically follow since they are dependent upon access.

Since Chief Justice Struckmeyer, writing for the *Bonelli* majority, failed to remark upon or consider the loss of riparian status of the plaintiff, it might be inferred that no such vestigial riparian rights are recognized by the court. It is hoped that no such implication was intended. Such a conclusion, however, is difficult to avoid; if the riparian status held any significance for the justices in the majority, its loss presumably would have been weighed against the interest of the state in retaining the exposed bed. In other words, the result may not have been different, but the manner of arriving at that result may have been.

Instead of weighing the competing interests, the court merely de-

114. ARIZ. CONST. art. 17, §§ 1, 2.

115. *E.g.*, Shepherd v. Coeur d'Alene Lumber Co., 16 Idaho 293, 101 P. 591 (1909); *cf.* Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) (those riparian rights not conflicting with appropriation doctrine are in full force as part of the common law of New Mexico). *See also* Note, *Riparian Rights in Appropriation States*, 9 WYO. L.J. 130 (1955).

nied the plaintiff's claim to the reexposed land by blandly distinguishing the dredging operation from water-caused alluvion deposition and natural reliction. Though the inference of nonrecognition is possible, the court should speak directly to the issue of whether or not vestigial riparian rights are recognized in Arizona. The existence of such rights has at least one vocal friend on the court in Justice Lockwood.[116] Her lengthy dissenting opinion in *Bonelli* distinguished the riparian *use* right from other common law riparian rights and concluded that the latter survived the abrogation of the former.

The tenor of Arizona judiciary on such rights is difficult to ascertain. The riparian right to natural accretions has been upheld by the Arizona Court of Appeals,[117] and the doctrine of accretion has been applied by the Supreme Court of Arizona to confirm jurisdiction over a criminal act.[118] These decisions, however, provide little insight into the Arizona judicial view of the right of access. The court of appeals rested on the theories of compensation and boundary, while the high court merely cited the mechanical boundary rule.

The case of *Brasher v. Gibson*[119] at first impression seems to preclude any recognition of the right of access. There the court stated that no riparian rights were recognized at all in the state, and denied a right of access and use to a landowner who had become riparian to a *man-made* lake. The court, however, cited cases from *riparian* jurisdictions which hold the same result, thus relegating the pronouncement to dictum.

The ominous void in *Bonelli* should be filled by an express judicial affirmation of the riparian right of access to navigable waters. Statutes in derogation of the common law should be strictly construed.[120] It is inconceivable that in adopting the appropriation doctrine the Arizona constitutional convention sought to deny the common law right of a riparian in Yuma, for instance, to wharf out into the river to provide mooring for rivercraft. Since the section of the state constitution purporting to abolish riparian rights is contained in the water *use* article, it should be limited to the abolition of the riparian usufructory right only. The right of access is not inconsistent with the appropriation system.[121]

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116. State v. Bonelli Cattle Co., 107 Ariz. 465, 469-72, 489 P.2d 699, 703-06 (1971) (Lockwood, J., dissenting).
117. State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P.2d 352 (1967).
118. State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963).
119. 101 Ariz. 326, 419 P.2d 505 (1966).
120. Richardson v. Ainsa, 11 Ariz. 359, 95 P. 103 (1908).
121. *See* note 115 *supra; cf.* United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

APPLICATION OF FEDERAL LAW

Since the *Bonelli* parcel is federally patented land, grounds may exist for invoking federal jurisdiction and law over the issues involved in that case. In *United States v. Washington*[122] the Ninth Circuit held that when title is in or derived from the federal government, the question of ownership of accretions is to be determined by federal law. That case dealt with accretions to federally held upland. State law denied any right to accretions, and the state claimed the new land. The court awarded the disputed land to the federal government as the owner of the upland.

A later case, *Hughes v. Washington*,[123] dealt with the same state law denying littoral owners any accretions. This upland had been federally patented to the plaintiff's predecessor-in-interest before Washington's statehood. The Supreme Court of the United States, citing *United States v. Washington* with approval, held that what rights are conveyed by, and

> the extent of ownership under a . . . federal grant [are] governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline *or on a particularized problem relating to the ownership of accretion.*[124] [Emphasis added.]

The disputed land was awarded to the upland owner by operation of the accretion doctrine. It is apparent then, that the issue as to the ownership of post-Hoover Dam accretions is a matter of federal law and that the *Bonelli* definition of the high water mark is inapplicable to the land disputed in that case, other federally patented lands, Indian lands, and federally held lands.[125]

The issue of ownership of reclamations, however, may or may not be a matter of federal law where federally held or federally granted lands are involved. It is possible that *Hughes* and *Washinton* could be limited to their facts so that federal law is applicable only to "natural" or water-borne additions to such lands. This limitation would leave the disposition of reclamations to the determination of state law.[126] The cases might easily be read, however, to include recla-

122. 294 F.2d 830 (9th Cir. 1961), *cert. denied*, 369 U.S. 817 (1962).
123. 389 U.S. 291 (1967).
124. *Id.* at 292.
125. *See* United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966).
126. *See* Barney v. City of Keokuk, 94 U.S. 324, 337 (1876):
> It is generally conceded that the riparian title attaches to subsequent ac-

mations as "streamlined accretions."[127] Since the *Bonelli* parcel is federally patented land, the rights inherent in the grant, including those regarding the addition of lands by "artificial means" and reclamation-created changes in the boundary between the upland and the water, could arguably be governed by federal law.[128]

Although the federal rule may not be readily ascertained, it is very possible that the federal courts would adopt the navigational purpose rule.[129] If this were not so, every time the federal government dredged the Colorado River adjacent to federal and Indian lands situated in Arizona, it would be cutting off riparian access of those lands. Though the federal courts might give weight to the Arizona decision, it is possible that they would reach a different result. Citing the federal and state power over navigation, the *Hughes* Court stated that although the right of access to water is "subject to considerable control by the neighboring owner of the tideland, . . . this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner."[130] This statement embodies the spirit of the navigational purpose rule. Since the upland owner is subject to losing his access to water and other riparian benefits by, and is therefore at the mercy of, federal or state exercise of navigation powers, when land upcast by artificial means is not needed for a navigational purpose, title should go to the upland by the doctrine of accretion.

ALTERNATIVE RESOLUTIONS

The *Bonelli* result on the reclamation issue will cause many stretches of land along the Colorado River to lose their riparian character. The state will gain a corridor of valuable riparian bottom-land

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cretions . . . effected by gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river . . . is a question which each state decides for itself.

That case, however, involved neither federally held upland nor federally granted upland. *See* Borax Consol. v. City of Los Angeles, 296 U.S. 10 (1935) (meaning of phrase "mean high tides" present in post-statehood federal grant determined under federal, not state law).

127. State v. Gill, 259 Ala. 177, 183, 66 So. 2d 141, 145 (1953); *see* text & notes 79-82 *supra*.

128. *Compare* Barney v. City of Keokuk, 94 U.S. 324 (1876), *with* Hughes v. Washington, 389 U.S. 291 (1967), *and* United States v. Washington, 294 F.2d 830 (9th Cir. 1961).

129. *See* text & notes 76-82 *supra*. *See also* 43 U.S.C. §§ 1301-1343, 1301(a)(3), 1311 (1970), amounting to a federal quit-claim of reclamations. Indian lands, however, are exempted from the effect of the act. *Id.* § 1313.

130. 389 U.S. at 294. *Cf.* Burns v. Forbes, 412 F.2d 997 (3d Cir. 1969) (dictum that reclamations caused by a third person having no connection with the upland owner inure to upland title).

exposed by the dredging operations of the Bureau of Reclamation at no expense to the state. On the other hand, had the result gone the other way, the riparians along the river in many cases would have been granted a bonus of large acreages of that same valuable land without any effort or expenditure on their part. Either result is arguably inequitable.

There are three alternatives which would better protect the riparians and simultaneously safeguard the state's interest in the reclaimed lands. One alternative, which could be judicially imposed, is to require the state to compensate the riparian for his loss of access to the waters. The right of access is a valuable property right deriving from the natural location of land.[131] The reclamation of state land intervening between the riparian and the new water mark in effect transfers this property right to the state land. That the state holds the technical fee to the soil under the river does not support such a transfer, for that soil itself was subject to the access easement in favor of the riparian land. Neither does the navigation servitude support the transfer since the improvement of navigation in no way requires it. Thus access is destroyed by ownership of the intervening land and is transferred to state land which previously had no appurtenant right of access. The state therefore could be required either to compensate the riparian for this loss or to renounce its interest in the new land and allow the riparian to take it.[132]

A second alternative, which could also be judicially imposed, is to allow a right of easement across the intervening state land. Such a result was reached in *Commercial Waterway District No. 1 v. Permanente Cement Co.*, where the Washington court allowed a littoral right of easement across the intervening bed cast up by channel dredging carried out by the state's grantee.[133]

A third alternative is one which will protect all the interest involved in a more equitable manner. The legislature could provide that the riparians be given the right to purchase the exposed river-bot-

131. *E.g.*, Norwalk v. Podmore, 86 Conn. 658, 86 A. 582 (1913); Lyon v. Fishmonger's Co., 1 App. Cas. 662 (H.L. 1876).

132. *See*, Note, *Access and Reclamation*, 32 YALE L.J. 1 (1922). *See also* Marshall v. Ulleswater Steam Navigation Co., L.R. 7 Q.B. 166 (1871).

133. 61 Wash. 2d 509, 379 P.2d 178 (1963). *See also* Melbourne Harbour Trust Comm'rs v. Colonial Sugar Refining Co. Ltd., [1925] Vict. L.R. 384, 438-39, 462-64 (Austl. 1925). The easement, while technically preserving access, would cause problems for the riparians as well as the state. For example, a private person may have built a hotel along the river only to have the federal government dredge the river with the resultant intervening reclamation between the riparian and the river. The state might use the parcel for an incompatible project, and the easement would then mean very little.

tom which interposes itself between the upland and the new channel. A reasonable price could be set which should be the fair market value of the land less the value attributable to its proximity to the river, since the original parcel was riparian prior to the dredging. If a particular riparian values the right of access, he should be permitted to purchase as much of the frontage as he desires up to the limit of his original shoreline. A reasonable time limit could be set within which to notify the state of an intent to purchase. Failure to exercise the option within the specified time period would confirm title in the state.

The proceeds from such sales could be deposited in a fund established to promote the broad purposes of the public trust from which the lands came—namely the promotion of public use and enjoyment of navigable waters. This promotion might take the form of state navigational improvement, state parks along the river where the state owns the upland, docks, marinas, and other facilities. This "transformation" of trust property no longer essential to protect the rights of navigation and public enjoyment, would be consistent with the purpose of the formation of the trust.[134] Such a solution would protect all the interests, to greater or lesser degrees, instead of causing a boon on the one hand and an irretrievable loss on the other.

CONCLUSION

The problems faced by the *Bonelli* court were formidable and deserved more written explication than they received. The holding regarding post-Hoover Dam accretions and the definition of the high water mark must be reconsidered either by the Supreme Court of Arizona or, in the case of lands vested in or *derived from* the federal government, by the federal courts. Allowing the 1938 high water mark to delineate the boundary between the state-owned bed and the uplands does violence to the accretion doctrine and hundreds of years of common law. Practically, the decision will cause confusion and hardship among landholders within Arizona along the Colorado River. Because the lands involved in *Bonelli* had previously been held by the upland owner and were then lost to the river by erosion, re-exposure of the lost acreage should result in an award to the upland owner by the doctrine of re-emergence. The cause of the re-exposure should be of no effect.

The broader holding regarding the reclamation issue failed to consider the certain loss of riparian status due to forces wholly be-

134. *See generally* Sax, *supra* note 19.

yond the control of the upland owner. This omission perhaps forbodes the untimely demise of the riparian right of access to navigable waters in Arizona. That such a right exists should be judicially affirmed and its loss weighed against other considerations presented in the reclamation issue involved in *Bonelli*. Once this vestigial riparian right is established, traditional accretion theory, as supplemented by the navigational purpose rule, provides ample support for an award of reclaimed land to the upland. Such a result may be reached by federal courts in dealing with lands in or derived from the federal government.

Finally, in the absence of judicial action a solution should be sought that will protect all of the interested parties involved in the reclamation problem. It is proposed that by giving the riparian the right to purchase intervening reclamations and by setting up a fund derived from such sales to promote the purpose of public use and enjoyment of navigable waters, the legislature could effect a more equitable result than the one fashioned by the court.